TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted]207

FEDERAL TRADE COMMISSION, PLAINTIFF IN ERROR,

vs.

P. LORILLARD COMPANY, INC.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 27, 1923.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 816.

FEDERAL TRADE COMMISSION, PLAINTIFF IN ERROR,

vs.

P. LORILLARD COMPANY, INC.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Record from United States District Court for the Southern District of New York:		
Writ of error	1	1
Clerk's certificate	4	1
Equity subpœna and marshal's return	5	2
Alternative writ of mandamus and marshal's return	7	3
Order granting alternative writ	10	4
Petition for writ of mandamus	12	5
Exhibit A to petition.—Resolution No. 129 of the United States Senate, August 9, 1921	27	12
Exhibit B to petition.—Resolution of the Federal Trade Commission, October 14, 1921	28	13
Exhibit C to petition.—Letter, Federal Trade Commission to P. Lorillard & Co. (Inc.), October 6, 1921	30	14
Exhibit D to petition.—Notice and demand of the Federal Trade Commission, October 17, 1921	31	15
Exhibit E to petition.—Letter, The Federal Trade Commission to R. W. Bell, October 26, 1921	34	16
Exhibit F to petition.—Letter, R. W. Bell to Husted Thompson, November 10, 1921	38	18
Exhibit G to petition.—Notice and demand of the Federal Trade Commission, March 3, 1922	41	21
Exhibit H to petition.—Letter, W. R. Bell to James A. Horton, March 10, 1922	46	23
Exhibit I to petition.—Complaint of the Federal Trade Commission, May 29, 1922, against various respondents	47	24

	Original.	Print
Affidavit of James A. Horton	55	3
Affidavit of J. P. Yoder	57	3
Affidavit of Henry Miller	59	3
Note of issue	62	3
Stipulation extending time	63	3
Answer and objections	64	3
Stipulation for adjournment	73	3
Affidavit of Thomas J. Maloney	75	3
Exhibit A to Maloney's affidavit.—Analysis of 1921 sales	86	4
Exhibit B to Maloney's affidavit.—Letter, Federal Trade Commission to P. Lorillard & Co. (Inc.), October 6, 1921	86	4
Exhibit C to Maloney's affidavit.—Letter, W. B. Bell to Millard F. Hudson, October 17, 1921	87	4
Exhibit D to Maloney's affidavit.—Notice and demand of the Federal Trade Commission, October 17, 1921	89	4
Exhibit E to Maloney's affidavit.—Letter W. B. Bell, to the Federal Trade Commission, October 21, 1921	91	4
Exhibit F to Maloney's affidavit.—Letter. the Federal Trade Commission to P. Lorillard Co., October 21, 1921	92	4
Exhibit G to Maloney's affidavit.—Letter, Husted Thompson to R. W. Bell, October 26, 1921	94	4
Exhibit H to Maloney's affidavit.—Letter, W. B. Bell to Husted Thompson	97	5
Exhibit I to Maloney's affidavit.—Letter, Rush W. Williamson to W. R. Perkins, January 19, 1922	101	
Exhibit J to Maloney's affidavit.—Letter, W. B. Bell to Rush W. Williamson, February 3, 1922	102	
Exhibit K to Maloney's affidavit.—Notice and demand of the Federal Trade Commission, March 3, 1922	103	
Exhibit L to Maloney's affidavit.—Letter, W. B. Bell to James A. Horton, March 10, 1922	107	
Exhibit M to Maloney's affidavit.—Letter, W. B. Bell to W. H. Fuller, April 24, 1922	108	
Exhibit N to Maloney's affidavit.—Answer of P. Lorillard Co. before Federal Trade Commission	109	
Affidavit of William B. Leonard	112	
Affidavit of C. Frances Merz	117	
Opinion, Manton, J	119	
Notice of settlement	133	
Order denying writ of mandamus	134	
Order to show cause	135	
Affidavit of Adrien F. Busick	136	
Order transferring cause to law court	138	
Assignment of errors	139	
Stipulation for addition to record	150	
Prayer for reversal	151	
Petition for writ of error	152	
Citation and service	153	
Stipulation as to transcript	155	

1 *Writ of error.*

(Filed Jan. 2, 1923.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable judges of the District Court of the United States, for the Southern District of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the Federal Trade Commission, petitioner, *v.* P. Lorillard Company, Inc., respondent, a manifest error hath happened to the great damage of the said The Federal Trade Commission as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Wm. H. Taft, Chief Justice of
2-3 the United States, the 2d day of January, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the United States the one hundred and forty-seventh.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

JNO. C. KNOX,
U. S. District Judge

4 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE FEDERAL TRADE COMMISSION, PLFF. IN ERROR,
vs.
P. LORILLARD COMPANY, DEF. IN ERROR. } E. 24–64

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby

certify that the following is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the Southern District of New York, this ninth day of January, in the year of our Lord one thousand nine hundred and twenty-three, and of the independence of the said United States the one hundred and forty-seventh.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk.

5 *Equity subpœna.*

In United States District Court.

The President of the United States of America to P. Lorillard Company, Inc., greeting:

You are hereby commanded to appear before the judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said court in a suit in equity by the Federal Trade Commission and to further do and receive what the said court shall have considered in this behalf; and this you are not to omit under the penalty on you of two hundred and fifty dollars ($250).

Witness: Hon. Learned Hand, judge of the District Court of the United States for the Southern District of New York, at the city of New York, on the 14th day of June, in the year one thousand nine hundred and twenty-two, and of the independence of the United States the one hundred and forty-six.

ALEX. GILCHRIST, Jr.,
Clerk.

WILLIAM HAYWARD,
U. S. Attorney, Sol'r for Petitioner.

The defendant required to file their answer or other defense in the above cause in the clerk's office of this court on or before the 20th day after service hereof, excluding the day of said service, otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk.

6 Form 302.

I hereby certify that on the 14th day of June, 1922, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant, P. Lorillard, Inc., by exhibiting to Wm. B. Rhett as secty. and treas. of said Co. at No. 119 West 40th Str., N. Y. C., the within original, and at the same time

leaving with him a copy thereof, and at the same time and place leaving with him a copy of petition and order with notice of filing.

WM. C. HECHT,
U. S. Marshall, Southern District of New York.

Dated June 14, 1922.

7 *Alternative writ of mandamus.*

In the District Court of the United States for the Southern District of New York.

Whereas it appears from the petition of the Attorney General of the United States, filed at the request of the Federal Trade Commission of the United States, that the said Federal Trade Commission has instituted an investigation of the tobacco industry in the United States pursuant to the power and authority granted to, invested in, and conferred upon said Federal Trade Commission by the act of Congress entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914 (38 Stat. 717).

That the P. Lorillard Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and that it has an office for the conduct of its business located in the city of New York, in the Borough of Manhattan, State of New York, at premises known as 119 West 40th Street, being within the Southern District of New York, and has in its custody and control, or in the custody and control of its officers, agents, or employees, all of the books, accounts, records, documents, memoranda, contracts, papers, and correspondence of the said corporation.

8 That at the several and various times as set forth in the petition of the said Federal Trade Commission, pursuant to its power and authority and for the purpose of enabling it to perform the duties imposed upon it by the act of Congress aforesaid, duly appointed and authorized as its agent and examiner James A. Horton and authorized him upon its behalf to inspect and examine the accounts, books, records, documents, memoranda, contracts, papers, and correspondence of the said defendant P. Lorillard Co., incorporated, and the said duly authorized agent and examiner while so authorized applied to and made demand upon said defendant for permission to examine the said accounts, books, records, documents, memoranda, contracts, papers, and correspondence of the said corporation, and the said defendant, then and there having the same in its custody and control, failed, neglected, and refused to permit the said commission, by its duly authorized agent and examiner, to have access to or to examine the said accounts, books, records, documents, memoranda, contracts, papers, and correspondence.

Whereas it has been ordered by the Hon. John C. Knox, district judge of the Southern District of New York, that an alternative

writ of mandamus, issued as prayed, you are therefore commanded, unless said accounts, books, records, documents, memoranda, contracts, papers, and correspondence are immediately submitted to the duly authorized agent and examiner of the Federal Trade Commission for inspection and examination and for the purposes of making copies thereof, as prayed, that you appear before the United States District Court for the Southern District of New York on the 23rd day of June, 1922, to show cause, if any there be, why the peremptory writ of mandamus as prayed should not be granted. Herein fail not.

Witness:

The Hon. LEARNED HAND,
Judge of the United States District Court
of the South District of New York.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk of the United States District Court
of the Southern District of New York.

This 14th day of June, 1922.

9 Form No. 302.

I hereby certify that on the 14th day of June, 1922, at the city of New York, in my district, I served the within alternative writ of mandamus upon the within-named defendant, P. Lorillard Co., Inc., by exhibiting to Wm. B. Rhett as secty. and treas. of said Co., at 119 West 40th Str., N. Y. C., the within original, and at the same time leaving with him a copy thereof.

WM. C. HECHT,
U. S. Marshal, Southern District of New York.

Dated June 14, 1922.

10 *Order granting alternative writ of mandamus.*

In the District Court of the United States for the Southern District of New York.

[Title omitted.]

Upon motion of the United States attorney for the southern district of New York upon the verified petition herein filed this day praying for a writ of mandamus to issue against the P. Lorillard Company, Incorporated, requiring them to permit the Federal Trade Commission, by its authorized agents and examiners, to have access to the accounts, books, records, documents, memoranda, contracts, papers, and correspondence of said defendant, and on the affidavits of James A. Horton and J. P. Yoder, verified the 31st day of May, 1922, and the affidavit of Henry Miller, verified June 1, 1922, it is

Ordered that the clerk of this court issue an alternative writ of mandamus commanding the defendant P. Lorillard Company, Inc., unless the accounts, books, records, documents, memoranda, papers, and correspondence of the said defendant are immediately submitted

to the duly authorized agent and examiner of the Federal Trade Commission for inspection and examination and for the purpose of making copies thereof as prayed that the said defendant, P. Lorillard Company, Inc., appear before the United States District
11 Court for the Southern District of New York on the 23rd day of June, 1922, to show cause, if any there be, why a peremptory writ of mandamus as prayed should not be granted.

This 13th day of June, 1922.

JNO. C. KNOX,
U. S. D. J.

12 *Petition for writ of mandamus.*

In the District Court of the United States for the Southern District of New York.

[Title omitted.]

To the honorable, the judges of the District Court of the United States for the Southern District of New York:

The Federal Trade Commission, by William Hayward, United States attorney in and for the Southern District of New York, acting under the direction and by the authority of the Attorney General of the United States, at the request of the Federal Trade Commission, files this petition and application for a writ of mandamus, and complaining of the respondent, P. Lorillard Company, incorporated, respectfully shows, and upon information and belief, alleges:

1. That petitioner, the Federal Trade Commission, is a body politic, or tribunal, created, organized, and existing under and by virtue of an act of Congress entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, which act is hereinafter referred to as the "Federal trade act."

13 2. The respondent, P. Lorillard Company, incorporated, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

3. That said respondent is engaged in the business of the manufacture and sale of tobacco and tobacco products in the Southern District of New York.

4. That said respondent in the manufacture and sale of tobacco and tobacco products aforesaid is engaged in interstate commerce, and is engaged in doing business among the several States and Territories of the United States and also with foreign countries.

5. That said respondent in the conduct of its business, as aforesaid, has, keeps, and maintains an office at premises known as 119 West 40th Street in the Borough of Manhattan, city, county, and State of New York.

6. That said respondent at its office, referred to in paragraph 5 hereof, keeps and has in the custody and control of its officers, agents, or employees certain books, documents, papers, writings, correspondence, and other documentary data relating to and bearing upon

its said business which is carried on in interstate commerce, as aforesaid.

7. That the Federal trade act, aforesaid, approved September 26, 1914, among other things, gives to petitioner the power, and places upon it, the Federal Trade Commission, a duty, to gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practice, and management of any corporation which is engaged in interstate commerce, and also as to the relation of the corporation being so investigated to other
14 corporations, associations, and partnerships, as is specifically set forth in section 6, subdivision (a) thereof.

8. That said Federal trade act, among other things, gives to the petitioner the power, and places upon it a duty, as is set forth in section 6, subdivision (d) of the act aforesaid, upon the direction or request of either House of Congress, to investigate and report the facts developed or ascertained upon such investigation, relating to any alleged violation of the antitrust acts by any corporation engaged in interstate commerce.

9. That on or about September 16, 1921, there was filed with the Federal Trade Commission, in the office of the secretary thereof a complaint against the respondent, P. Lorillard Company, incorporated.

10. That said complaint alleged that said respondent in the conduct of its business in interstate commerce was indulging in practices which were in violation of certain provisions of the several acts of Congress, or certain of them, among which is the act of Congress approved September 26, 1914 (38 Stat. 717), in that the respondent was using certain methods or business practices resulting in unfair competition, in that it was regulating and fixing, or attempting to regulate and fix, the prices at which the commodities sold by it should be resold by those to whom it had sold them, and was cooperating, aiding, and abetting others to successfully formulate and carry out a scheme or combination, pursuant to which the resale prices of respondent's commodities should be fixed and maintained by those to whom respondent had previously sold its products, or commodities.

11. That on August 9, 1921, the Senate of the Congress of
15 the United States by its Resolution No. 129, duly adopted, directed:

"* * * the Federal Trade Commission * * * to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to market price to producers of tobacco, and the market price for manufactured tobacco and the price of leaf tobacco exported and to report to the Senate as soon as possible the result of such investigation."

A copy of said resolution in full is annexed hereto and marked "Exhibit A."

12. That petitioner being informed as hereinbefore set forth, in order that it might be determined whether there was reason to be-

lieve that an unfair method of competition had been or was then being used, and in order that it might inform the Senate of the United States as by it requested, acting upon its own motion and under and pursuant to the authority conferred upon it by section 6 of its constituent act, did formally determine to gather and compile information concerning, and to investigate the organization, business, conduct, practices and management of the respondent, P. Lorillard Company, incorporated, and to investigate and determine the facts of the relation of said respondent to other corporations, individuals, associations, and partnerships.

Copy of the resolution adopted by the commission, dated October 14, 1921, is annexed hereto and marked " Exhibit B."

13. That petitioner pursuant to its determination aforesaid,
16 as set forth in paragraph 12 hereof, did, by its duly accredited, authorized, and appointed agents or representatives, actually embark upon such investigation and did gather and compile certain information relating to the conduct of respondent's interstate commerce business.

14. That at various times from September 29, 1921, to November 5, 1921, certain duly authorized and accredited agents or representatives of petitioner at reasonable times did, on behalf of the Federal Trade Commission, demand of the respondent that it produce and furnish to them at respondent's office or place of business, 119 West 40th Street, in the city of New York, N. Y., certain specified documentary evidence, or written data, correspondence, and other paper writings, which were then and there in the possession, custody, or control of respondent, that copies thereof, or of parts thereof, might be made.

15. That respondent, complying with said demand and pursuant to its duty under the provisions of the Federal trade act so to do, did produce for the perusal, inspection, and examination of petitioner's representatives, and for making copies thereof, certain of the data demanded.

16. That respondent, in violation of its duty so to do, and in violation of the provisions of the Federal trade act aforesaid, did refuse to produce for the inspection, examination, and perusal of petitioner's said duly authorized agents or representatives, certain documentary evidence, records, correspondence, and writings herein specified which were then and there in respondent's possession, custody, and control, and did refuse to permit copies thereof to be made by petitioner.

17 17. That the documentary evidence, records, correspondence, or writings which respondent refused to produce as demanded, as is set forth in paragraph 16 hereof, related to respondent's business in interstate commerce.

18. That on or about October 6, 1921, respondent, at the time of its refusal to produce the records demanded, as herein set forth, did upon its part, by its president, Thomas J. Maloney, demand that

the Federal Trade Commission reduce its demand to writing, and that such writing be served upon respondent.

19. That after respondent did so refuse to produce its records, as herein set forth in paragraphs 16 and 17, petitioner did serve upon respondent a demand in writing that such records be produced and that its duly authorized agents be permitted access thereto and permitted to make copies thereof.

A copy of such demand, so served, dated October 6, 1921, is annexed hereto, marked "Exhibit C."

20. That thereafter petitioner's duly authorized and accredited agents did in person, during the usual business hours, present such written demand at the office of said respondent, 119 West 40th Street, New York City, New York, on October 10, 1921.

21. That respondent did thereafter refuse to accede thereto, and did refuse to produce the data or records demanded, and did refuse to permit access thereto or inspection thereof by petitioner's agents aforesaid, and did refuse to permit copies thereof to be made.

22. That thereafter petitioner, the Federal Trade Commis-
18 sion, by demand in writing dated October 17, 1921, and served upon the respondent on October 19, 1921, did again demand of respondent that it be permitted access to said records.

Copy of said written demand is annexed hereto, marked "Exhibit D."

23. That respondent refused to comply with the demand of petitioner and did refuse to permit petitioner or its duly authorized agents and accredited representatives access to the data, and refused to produce the records demanded and refused to permit copies thereof to be made.

24. That the records, correspondence, and written data so refused all related to respondent's business in interstate commerce.

25. That under date of October 21, 1921, respondent addressed a communication in writing to petitioner definitely refusing to comply with the demand of petitioner.

26. Petitioner, under date of October 26, 1921, in a communication in writing, addressed to respondent, again demanded that said records be produced for inspection by petitioner's duly authorized agents or representatives, and that copies thereof might be made.

Copy of said communication is annexed hereto, marked "Exhibit E."

27. Respondent, by communication in writing dated November 10, 1921, again definitely and unequivocally refused to comply with said demand and refused to permit petitioner's representatives to have access thereto, and refused to permit copies thereof to be made.

Copy thereof is annexed, marked "Exhibit F."

19 28. That by writing dated March 3, 1922, petitioner again demanded of respondent that the records, correspondence, paper writings, and documents therein described be produced for

inspection by its duly authorized agents and accredited representatives.

A copy of said demand is annexed, marked "Exhibit G."

29. The demand referred to in paragraph 28 hereof was duly presented to respondent at its office, 119 West 40th Street, Borough of Manhattan, New York City, by James A. Horton, a duly authorized agent or representative of petitioner, during the usual business hours on March 8, 1922.

30. Respondent at the time said demand in writing was served by said James A. Horton refused to comply therewith and refused to permit said James A. Horton, a duly authorized agent of petitioner, to have access to the records, correspondence, paper writings, and data described therein and refused to produce the same for the inspection of said James A. Horton, that copies thereof might be made.

31. By letter dated March 10, 1922, copy of which is annexed hereto, marked "Exhibit H," respondent by its counsel reiterates its refusal.

32. Respondent has refused and still continues to refuse to permit the petitioner or any of its duly authorized agents or representatives to have access, at reasonable times and at any time whatsoever, to the records specified in "Exhibit G" or to make copies thereof.

33. That petitioner, under date of January 17, 1922, made and transmitted to the Senate of the Congress of the United States, a preliminary report in writing setting forth the facts developed by petitioner's investigation, insofar as it was able to prosecute same, up to that time, as was requested of it by resolution No. 129, 67th Congress, adopted August 9, 1921.

34. That said report referred to in paragraph 33 hereof, on January 18, 1922, was by the Senate referred to the Committee on Agriculture and Forestry and on January 25, 1922, was duly ordered to be printed as a public document.

35. That thereafter the report referred to in paragraphs 33 and 34 hereof was duly printed as and is Senate Document 121, 67th Congress, 2d session, and reference thereto is hereby made to it as such.

36. That said report is preliminary and does not purport to set forth all of the facts relating to the subject matter therein discussed.

37. That respondent's acts in refusing to comply with the provisions of the Federal trade act aforesaid as herein set forth, and in refusing to produce for the inspection of petitioner, or its duly authorized agents, its records, and in refusing to permit petitioner to make copies thereof, precluded, and has prevented petitioner up to the present time from making a report to the Senate embodying a full and complete statement of the facts relating to the subject matter involved in said Senate resolution No. 129 aforesaid.

38. Respondent's acts as herein set forth have also prevented petitioner from prosecuting its duty and hindered it in the exercise of its

power given to it by said Federal trade act, and thereby
21 precluded petitioner from compiling information, and investigating the organization, business, conduct, practices, and management of respondent and its relation to other corporations and to individuals, associations, and partnerships.

39. That respondent by its said acts hinders and prevents petitioner from exercising its power, in the performance of its duty to prevent persons, partnerships, or corporations from using unfair methods of competition in interstate commerce.

40. That the said acts by the respondent herein complained of have continued during all the times herein mentioned and continue to the present time.

41. That it is necessary and essential that petitioner have access to the records, papers, correspondence herein specificially set forth, and the right to examine the same and to make copies thereof, that it may properly exercise its power and perform the full duty placed upon and delegated to it by the act approved September 26, 1914, aforesaid.

42. That on or about May 31st, 1922, there was issued and served upon the respondent and others a complaint by the Federal Trade Commission alleging violation of the provisions of section 5 of "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, with respect to the respondent's business in interstate commerce in so far as it related to the other parties named in said
22 proceeding as set forth in copy of said complaint annexed hereto and marked Exhibit "I."

43. That petitioner has no other adequate remedy by which defendant may be required to comply with the provisions of the Federal trade act, and with the demand or order of the Federal Trade Commission made in the proper exercise of its power thereunder and pursuant to the provisions thereof.

44. That no other application has been made for the relief herein prayed.

Wherefore, petitioner prays that this honorable court will grant unto it due process of subpœna directed to said respondent commanding said respondent to appear herein and to answer, but not under oath, answer under oath being hereby expressly waived, and to abide and perform such directions and decrees as may be made in the premises; that an alternative writ of mandamus forthwith issue commanding the respondent unless the accounts, books, records, documents, memoranda, contracts, papers, and correspondence of the respondent are immediately submitted to the duly authorized agent or examiner of the Federal Trade Commission for inspection and examination and for the purpose of making copies thereof, that respondent show cause before the United States District Court for the Southern District of New York on a day to be fixed by the court why a peremptory writ of mandamus should not issue directed to the said respondent commanding the respondent to forthwith deliver

nto the possession of the Federal Trade Commission or its duly authorized agent, at the office of the said corporation, No. 119 West 40th Street, in the city of New York, during the usual business hours of any business day and at such times as the duly authorized
3 agent shall request, for examination and inspection, and for the purpose of copying the same, or such portions thereof as nay be desired, the following:

All letters and telegrams received by the P. Lorillard Company, ncorporated, from all of its jobber customers located at different oints throughout the United States, and also copies of all letters and elegrams sent by said P. Lorillard Company, incorporated, to such obbers during the period January 1, 1921, to December 31, 1921, nclusive.

All letters and telegrams received by the P. Lorillard Company, incorporated, from all of its sales force or salesmen located in different parts of the United States, and also copies of all letters and telegrams ent by said P. Lorillard Company, incorporated, to said sales force r salesmen, and also all reports and memoranda made by said sales force or salesmen to the said P. Lorillard Company, incorporated, during the period January 1, 1921, to December 31, 1921, inclusive.

All letters and telegrams received by the P. Lorillard Company, ncorporated, from all tobacco jobbers' or wholesale grocers' associations located at different points throughout the United States, and also copies of all letters and telegrams sent by said P. Lorillard Company, incorporated, to said tobacco jobbers' or wholesale grocers' ssociations during the period January 1, 1921, to December 31, 1921, nclusive.

Any agreements or contracts or arrangements evidenced by any papers, documents, or correspondence between P. Lorillard
4 Company, incorporated, and tobacco jobbers' or wholesale grocers' associations located in different parts of the United States during the period January 1, 1921, to December 31, 1921, inclusive.

All letters and telegrams received by the P. Lorillard Company, Incorporated, during the period January 1, 1921, to December 31, 1921, inclusive, from the following-named corporations, located at different points throughout the United States: The American Tobacco Company, Tobacco Products Corporation, Liggett & Myers Tobacco Company, Scotten-Dillon Company, Bloch Brothers Company, United Cigars Stores Company, American Snuff Company, and R. J. Reynolds Tobacco Company, and also copies of all letters and telegrams sent said above-named corporations during the above-named period by the P. Lorillard Company, Incorporated.

All agreements or contracts or understandings evidenced by any papers, documents, or correspondence between the P. Lorillard Company, Incorporated, and the American Tobacco Company, Tobacco Products Corporation, Liggett & Myers Tobacco Company, Scotten-Dillon Company, Bloch Brothers Company, United Cigars Stores Company, American Snuff Company, and R. J. Reynolds Tobacco

Company during the period January 1, 1921, to December 31, 192 inclusive, all of the above-named concerns being corporations locate at different points throughout the United States.

And also commanding it, the respondent, to, in all respect
25 conform to the provisions of the Federal trade act, and to d and perform all of the said acts and things in the premises a the law requires, and for such other and further relief as to th court may seem good and proper.

HARRY M. DAUGHERTY,
Attorney General of the United States.
WILLIAM HAYWARD,
United States Attorney for the Southern District of New York.

26 CITY OF WASHINGTON,
District of Columbia, ss:

J. P. Yoder, being duly sworn, says that he is the Secretary of the Federal Trade Commission, petitioner in the above-entitled proceeding; that he has read the foregoing petition; that the facts stated therein are true of his own knowledge, except as to those matters stated therein to be alleged upon information and belief and as to those he believes them to be true; that the sources of deponent's information and the grounds of his belief are books, papers, documents, and records of petitioner in his possession as secretary of petitioner, statements made to him by members of the commission, by its agents and employees.

J. P. YODER.

Subscribed and sworn to before me this 31st day of May, 1922.
[SEAL.] WARREN R. CHOATE,
Notary Public.

My commission expires April 5, 1923.

27 *Exhibit A to petition.*

[S. Res. 129.]

In the Senate of the United States. August 9, 1921.

Resolved, That the Federal Trade Commission be, and is hereby, directed to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to market price to producers for tobacco and the market price for manufactured tobacco and the price of leaf tobacco exported, and report to the Senate as soon as possible the result of such investigation.

Attest:

(Sgd.) GEORGE A. SANDERSON,
Secretary.

Exhibit B to petition.

United States of America, before Federal Trade Commission, ss.

At a regular session of the Federal Trade Commission held at its office in the city of Washington, D. C., on this 14th day of October, A. D. 1921.

Present: Huston Thompson, chairman, Nelson B. Gaskill, Victor Murdock, John F. Nugent, commissioners.

FEDERAL TRADE COMMISSION
v.
P. LORILLARD COMPANY, INC.,

RESOLUTION.

Whereas the Federal Trade Commission was directed by Senate Resolution No. 129, 67th Congress, to investigate the tobacco situation in the United States, as to the domestic and export trade, with particular reference to the market price to producers of tobacco and the market price for manufactured tobacco and the price of leaf tobacco exported, and report to the Senate the result of such investigation; and

Whereas on application duly made to the Federal Trade Commission, the commission docketed for investigation, on September 16, 1921, an application for the issuance of a complaint against the P. Lorillard Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of New Jersey, said application being designated and known as the Federal Trade Commission file 1–2538; and it appearing to said commission that said P. Lorillard Company, Inc., is engaged in the business of manufacturing and selling tobacco products and causing such products to be transported to the purchasers thereof, from the State of New York and from other States wherein it maintains branch establishments, through and into other States of the United States and into foreign countries, and it further appearing from said application that said P. Lorillard Company, Inc., in the course of its said business is charged with engaging in an unfair method of competition in violation of section 5 of the Federal Trade Commission act; and

Whereas the Federal Trade Commission deems it necessary to gather and compile information concerning and to investigate the organization, business, conduct, practices, and management of said P. Lorillard Company, Inc.: Now, therefore, be it

29 Resolved, That the Federal Trade Commission conduct an investigation under authority of section 5 and section 6, paragraph (a) of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its

powers and duties, and for other purposes," and in pursuance of s Senate Resolution No. 129, 67th Congress, and said application f No. 1–2538, and for the further purpose of gathering and compili information concerning the organization, business, conduct, pra tices, and management of said P. Lorillard Company, Inc.; and be further

Resolved, That Clarence T. Sadler, an attorney and examiner o this commission be, and he is hereby, designated as the duly au thorized agent of the commission, to demand and have access to fo the purpose of examination and the right to copy any and all docu mentary evidence in the possession or control of said P. Lorillar Company, Inc., which may relate to or have any bearing upon an matters within the scope of the investigation hereby authorized.

Adopted by the commission:

(Signed) J. P. YODER,
Secretary.

30 *Exhibit C to petition.*

FEDERAL TRADE COMMISSION,
Washington, 6 October, 1921.

P. LORILLARD & COMPANY, INC.,
119 West 40th Street, New York City.

File 1–2538—Sen. Res. 129, August 9, 1921.

GENTLEMEN: In reference to the examination of your correspondence file by the commission's representative, Mr. Henry Miller, and others associated with him, we are informed that objection is made on the ground of possible breach of customer's confidence, interoffice and other correspondence not being segregated.

Investigators will inform you of scope of investigation. You will please be assured that nothing will be taken which is not germiane to that purpose. Also that the commission is not permitted, under its organic act, to make public trade secrets or names of customers.

In the light of this explanation it is believed that your objection to permitting examination of all correspondence will be removed, and demand is hereby made that you permit the commission's representatives to proceed.

Respectfully,

FEDERAL TRADE COMMISSION.
(Signed) MILLARD F. HUDSON,
Chief Examiner.

The above is an exact copy of a letter, as verified by me, which I, this 7th day of Oct., 1921, personally delivered to Thos. J. Maloney, Pres. of addressee, at his office as above.

(Signed) HENRY MILLER,
Attorney and Examiner.

31 *Exhibit D to petition.*

Notice and demand.

United States of America before Federal Trade Commission, ss.

To the P. LORILLARD COMPANY, INC.,
New York City, N. Y.

Please take notice that pursuant to the provisions of the act of Congress approved September 26th, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," section 9 of said act, reading as follows:

"SEC. 9. That for the purposes of this act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination and the right to copy, any documentary evidence of any corporation being investigated or proceeded against. * * *"

and pursuant to Senate Resolution No. 129 of the 67th Congress, adopted August 9, 1921, in words as follows:

"Resolved, That the Federal Trade Commission be, and is hereby, directed to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to market price to producers for tobacco and the market price for manufactured tobacco and price of leaf tobacco exported and report to the Senate as soon as possible the result of such investigation";

the Federal Trade Commission presents itself, by its duly authorized agents, for the purpose of inspecting, examining, and taking copies of, if deemed advisable, of any and all documentary evidence, including documents, papers, and correspondence in the possession or control of the P. Lorillard Company, Inc., said company being

32 a corporation organized and existing under and by virtues of the laws of the State of New Jersey, and being engaged in the manufacture of tobacco products, which it sells and transports, or causes to be sold and transported, in interstate commerce, for the further purpose of informing the Federal Trade Commission with respect to the above-entitled investigation and with respect to a certain application heretofore made to the commission for the issuance of a complaint against P. Lorillard Company, Inc., which application is designated and known as Federal Trade Commission's file No. 1-2538; it appearing from said application that P. Lorillard Company, Inc., is charged with engaging in an unfair method of competition in violation of section 5 of the Federal Trade Commission act, and for the further purpose of gathering and compiling information concerning the organization, business, conduct, practices, and management of said P. Lorillard Company, Inc., in pursuance of the authority granted said Federal Trade Commission under section 6, paragraph (a), of the Federal Trade Commission act. And to that end the Federal Trade Commission hereby

formally demands an opportunity to examine all documentary evidence, including all documents, papers, and correspondence in your custody or under your control, in order that copies may be made of such portions of said documentary evidence as may be deemed relevant.

In witness whereof the Federal Trade Commission has
33 caused this notice to be issued, signed by its secretary, and its official seal to be thereto affixed, this 17th day of October, 1921.

By the commission:

[SEAL.] (Signed) J. P. YODER,
Secretary.

I hereby certify that a duplicate original of the within notice and demand was duly served in person on W. B. Rhett, secretary & treasurer of the P. Lorillard Company, Inc., on the 19th day of October, 1921.

(Signed) CLARENCE T. SADLER,
Examiner.

34 *Exhibit E to petition.*

26 OCTOBER, 1921.

MY DEAR MR. BELL: Your letter of October 21st, in response to the formal demand of the commission that representatives be permitted to examine the correspondence, files, records, etc., of the P. Lorillard Company, has been received and noted by the commission.

It is noted that you desire us to inform you as to the name of the applicant who has made complaint against your company. The investigation which is the subject matter of this correspondence was instituted by the commission by instruction of the United States Senate, pursuant to Senate resolution number 129. In connection therewith and as a separate part thereof the commission is including in this investigation an inquiry with reference to the possible existence of practices in violation of section 5 of the Trade Commission act.

Under the rules of the commission disclosure is not made as to the name of a possible applicant, nor, in fact, whether the commission is proceeding upon the application of a private party or upon its own motion. Proceedings of the commission prior to the issuance of a formal complaint are not public records, and it has been found in the past that the disclosure of the identity of a private applicant for complaint has resulted in retributive measures being taken against that party. It is impossible, therefore, to comply with your request for the name of the private party applicant.

It appears from your letter of October 17th that objection is
35 made by the P. Lorillard Company to the examination of documentary evidence in the possession of that company which may effect third parties. We assume that this refers to correspondence which the Lorillard Company may have received from jobbers regarding the price cutting activities by other jobbers. We cannot

regard such correspondence as exempt from the right of preliminary examination by the commission under its statutory powers.

In this connection we desire to call your attention in particular to the double powers contained in the first paragraph of section 9 of the trade commission act, which reads in its essential part as follows:

"That for the purposes of this act the commission or its duly authorized agent or agents shall at all reasonable times have access to, for the purpose of examination and the right to copy, any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. * * *"

The commission understand this paragraph to mean that the commission has an unlimited right of access to the books and records of a corporation under investigation or being proceeded against at all reasonable hours and to make copies therefrom. It also has the power to require the attendance of witnesses and the production of documentary evidence by subpœna. But the exercise of the right of access, examination, and copying is not dependent upon the prior issue of subpœna. This is clearly shown by the double grant of power of enforcement. A demand for access and examination is enforceable under the fourth paragraph of the section by
36 action through the Attorney General for writ of mandamus. Refusal to comply with a subpœna is, under the second and third paragraphs of the section, dealt with by contempt proceedings in the United States district courts. Manifestly if the issue of a subpœna were a prerequisite in all cases to access and examination there would have been no need for the provision of an enforcement by mandamus.

We call your attention to the fact that the preliminary investigation now being made is directly pursuant to the instructions of a resolution by the United States Senate; that the actions of the commission under section 5 are supplementary thereto, and that the commission is proceeding on this preliminary examination under the first power conferred by the first paragraph of section 9 referred to above. In view of these conditions the commission insists that its representatives be given full and complete access to any and all documentary evidence in the possession or control of the P. Lorillard Company.

We can not accept the contentions of the Lorillard Company as set forth in your letter of October 17, nor permit the examination which has been instituted to be limited in the manner which you have suggested. We find no suggestion of such limitation in the statutory statement of the powers conferred upon the commission or the duties devolving upon it thereunder.

37 We trust that a reconsideration of the matter in the light of this letter will result in a withdrawal by you of the restrictions

which you have placed upon the actions of this commission through its representatives.

Cordially yours,

_____,
Chairman.

Mr. R. W. Bell,
Counsel the P. Lorillard Company,
119 West 40th Street, New York City.

38 *Exhibit F to petition.*

Law Department.

P. Lorillard Company, Incorporated,
119 West 40th Street, New York, November 10, 1921

Hon. Husted Thompson,
Chairman Federal Trade Commission,
Washington, D. C.

Dear Sir: After most earnest consideration of the formal demand of the commission on the P. Lorillard Company, in the light of your letter of October 26th, which was handed me by your Mr. Horton, we still find ourselves unable either to agree with your views or meet your wishes. Doubtless it would suffice as a reply were I to stop here; but you have written me your views so carefully and we have tried so sincerely to cooperate with the commission that I am induced to go further and indicate, succin'tly and in no sense exhaustively, some of the reasons that actuate us in the position we take.

Your letter makes it plain that the real source of the investigation is the direction contained in Senate Resolution 129. We feel that this resolution is totally inadequate for the purpose. Having been passed by only one branch of the legislative body, no authority is derivable from this resolution (U. S. v. L. & N. R. Co., 236 U. S. 318, 329). There is a provision of your act, sec. 6 (d), which authorizes the commission "upon the direction of the President or either House of Congress to investigate and report upon facts relating to any alleged violations of the antitrust acts by any corporation," but the resolution fails to comply with this provision in that it does not allege any such violations. What it directs an investigation of is "the tobacco situation in the United States," not of any alleged violations of an antitrust act. It seems clear to us that this prevents the resolution being that "direction" pursuant to which the act authorizes the commission to proceed.

When we go beyond the Senate resolution, your refusal to give information leaves us in ignorance. This we greatly deprecate, deeming your action in this respect subversive of some of our most cherished rights.

Your formal demand states that the information is desired "with respect to a certain application heretofore made to the commission for the issuance of a complaint against said P. Lorillard Company,

Inc., which application is designated and known as Federal Trade Commission File No. 1–2538." This led us to believe that, in an orderly and constitutional manner, we would be apprised of the accusation and the accuser, and the facts on the issues thus raised would be fully presented and a decision speedily and inexpensively reached. But you deny us this privilege. Instead, your letter under answer now tells us "the commission is including in this investigation an inquiry with reference to the possible existence of practices in violation of section 5 of the trade commission act"—a fishing expedition, pure and simple.

39

For such a purpose your demand "an opportunity to examine all documentary evidence, including all documents, papers, and correspondence in your custody and under your control," ignoring all questions of privilege, propriety, relevancy, or evidentiary value, and you vouch as authority for such a demand section 9, which you claim gives the commission an "unlimited right to the books and records of a corporation."

We cannot agree. The wit of man could not devise a more sweeping demand, a more drastic inquisition. To ascribe such a meaning to the trade commission act would be to make the act set at naught the Constitution of the United States. We can not believe that Congress could or would create such an instrumentality.

Such powers have been denied by the courts to the Interstate Commerce Commission (Harriman v. I. C. C., 211 U. S. 407) and to the Pacific Railway Commission (re Pacific Railway Commission, 32 Fed. 241), each of which acts contain fully as broad language. And the courts have declined to tolerate such demands in any other proceedings (Hale v. Henkle, 201 U. S. 43; Silver Thorn Lumber Co. v. U. S., 251 U. S. 385), deeming them unreasonable searches and seizures.

When the Federal Trade Commission act is read, as it must be, in the light of the Constitution and of such pertinent court decisions it does not confer on the commission the power you claim. On the one hand, it carefully refrains from giving the commission authority to enforce its orders and demands, which would make the commission the interpretor of its own powers. On the other hand, it distinctly makes necessary court action as a prerequisite to any such enforcement. These provisions requiring court action are not in any sense pro forma; they preserve constitutional rights, being necessary in order that the act might not be unconstitutional (I. C. C. v. Brimson, 154 U. S. 447, 485). And the courts in administering such provisions on the application of the commission, or otherwise, do not act simply as the executors of the commission's will, responding merely to the request of the commission. On the contrary, if there is any legal reason why the witness or party should not answer or produce papers their rights will be recognized and enforced, the court in such matters going fully into the merits of the situation and enforcing the order or demand of the commission only when it is satisfied from a knowledge of all the facts that there is a real complaint which is

within the legal purview of the commission, to which the desired testimony and papers, having been definitely described, are found to be relevant and capable of being given and produced without violating any constitutional right (I. C. C. v. Brimson, 154 U. S. 447, 479, 489; U. S. v. Bell, 81 Fed. 830, 848; I. C. C. v. Philadelphia, etc., Co., 123 Fed. 969, 970; Veeder v. U. S., 252 Fed. 414, petition for certiorari of which was denied by the Supreme Court, 246 U. S. 675).

40 Thus in U. S. v. Basic Products Co., 260 Fed. 472, 482, the court said:

"Counsel for the defendant urges upon this court the necessity of declaring section 6 of the trade commission act to be unconstitutional, not only 'in so far as it authorized investigations and compulsory disclosures of matters which are beyond the commerce power of Congress' but also 'in so far as it attempts to authorize a search or seizure by an administrative agency of the Government without charge or suspicion of wrongdoing.' While the contention of counsel is probably sound, this court does not deem it necessary to go further than to hold that the commission have not the power to carry on investigation which they have assumed in the present case."

Your demand includes our correspondence with our customers, many of whom are firms, individuals, and corporations not engaged in interstate commerce, into whose organization, business, management, and practices you have no authority whatever to inquire. And all of our customers are strangers to this controversy and so come within the protection of such cases as Ellis v. I. C. C., 237 U. S. 434, 445.

And while the act defines "documentary evidence" to mean "all documents, papers, and correspondence in existence at and after the date of the passage of this act," we believe the act unconstitutional in so far as correspondence is concerned, because the act does not except those intimate and confidential communications which have been privileged from time immemorial. See U. S. v. L. & N. R. Co., 236 U. S. 318, 336.

We have therefore concluded that your demand is unauthorized, and that our compliance with it would be a wrongful exposure of our documents, papers, and correspondence to examination.

We assure you that it is not a pleasant thing for us to have to take such a decided stand, but your attitude leaves us no other course. We have always sought to cooperate in all possible ways with the commission, and even as respects the Senate resolution your examiners are having access to our books and records. We therefore sincerely hope that you will reconsider the demands you have made, and, upon reflection, conclude that you should not press it further.

Yours very truly,

(Signed) W. B. Bell,

41 *Exhibit G to petition.*

United States of America before Federal Trade Commission, ss:

Notice and demand.

To P. LORILLARD COMPANY, INCORPORATED,
119 West Fortieth Street, New York City.

Please take notice that the Federal Trade Commission under authority of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," section 9 of said act of Congress reading as follows:

"That for the purposes of this act the commission or its duly authorized agent or agents shall at all reasonable times have access to for the purpose of examination and the right to copy any documentary evidence of any corporation being investigated or proceeded against: * * *."

for the purpose of gathering and compiling information concerning the organization, business, conduct, practices, and management of the P. Lorillard Company, incorporated, in pursuance of authority granted the Federal Trade Commission under section 6 (a) of the said act of Congress approved September 26, 1914, and also for the further purpose of informing the Federal Trade Commission with respect to a certain application heretofore made to the commission for the issuance of a complaint against the P. Lorillard Company, incorporated, which application is designated and known as Federal Trade Commission's file 1–2538; it appearing from said application that the P. Lorillard Company, incorporated is charged with

42 engaging in unfair methods of competition in violation of section 5 of the said act of Congress approved September 26, 1914, and

Further take notice that the commission, in response to United States Senate resolution No. 129, 67th Congress, adopted August 9, 1921, in words as follows:

"Resolved, That the Federal Trade Commission be, and is hereby, directed to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to market price to producers for tobacco and the market price for manufactured tobacco and price of leaf tobacco exported, and report to the Senate as soon as possible the result of such investigation;"

under authority of said act of Congress approved September 26, 1914, particularly section 9 of the said act of Congress as hereinbefore set forth, and section 6 (d) in words as follows:

"Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust acts by any corporation."

presents itself by its duly authorized agent, James A. Horton, to the said P. Lorillard Company, incorporated, a corporation with principal office and place of business at No. 119 West Fortieth Street, New York City, and being engaged in the manufacture of tobacco products which it sells and transports or causes to be sold and transported in interstate commerce, for the purpose of inspecting, examining, and making copies of the following documentary evidence, including documents, papers, and correspondence in the possession or control of the said P. Lorillard Company, incorporated:

43 1. All letters and telegrams received by the P. Lorillard Company, incorporated, from all of its jobber customers located at different points throughout the United States, and also copies of all letters and telegrams sent by said P. Lorillard Company, incorporated, to such jobbers during the period January 1, 1921, to December 31, 1921, inclusive.

2. All letters and telegrams received by the P. Lorillard Company, incorporated, from all of its sales force or salesmen located in different parts of the United States, and also copies of all letters and telegrams sent by said P. Lorillard Company, incorporated, to said sales force or salesmen, and also all reports and memoranda made by said sales force or salesmen to the said P. Lorillard Company, incorporated, during the period January 1, 1921, to December 31, 1921, inclusive.

3. All letters and telegrams received by the P. Lorillard Company, incorporated, from all tobacco jobbers' or wholesale grocers' associations located at different points throughout the United States, and also copies of all letters and telegrams sent by said P. Lorillard Company, incorporated, to said tobacco jobbers' or wholesale grocers' associations during the period January 1, 1921, to December 31, 1921, inclusive.

4. Any agreements or contracts or arrangements evidenced by any papers, documents, or correspondence between P. Lorillard Company, incorporated, and tobacco jobbers' or wholesale grocers' associations located in different parts of the United States, during the period January 1, 1921, to December 31, 1921, inclusive.

44 5. All letters and telegrams received by the P. Lorillard Company, incorporated, during the period January 1, 1921, to December 31, 1921, inclusive, from the following-named corporations, located at different points throughout the United States: The American Tobacco Company, Tobacco Products Corporation, Liggett & Myers Tobacco Company, Scotten-Dillon Company, Bloch Brothers Company, United Cigar Stores Company, American Snuff Company, and R. J. Reynolds Tobacco Company, and also copies of all letters and telegrams sent above-named corporations during the above-named period by the P. Lorillard Company, incorporated.

6. All agreements or contracts or understandings evidenced by any papers, documents, or correspondence between the P. Lorillard Company, incorporated, and the American Tobacco Company, Tobacco Products Corporation, Liggett & Myers Tobacco Company, Scotten-

Dillon Company, Bloch Brothers Company, United Cigars Stores Company, American Snuff Company, and R. J. Reynolds Tobacco Company during the period January 1, 1921, to December 31, 1921, inclusive, all of the above-named concerns being corporations located at different points throughout the United States.

And to that end the Federal Trade Commission hereby formally demands an opportunity to examine and make copies of any or all of the aforesaid correspondence, documents, or papers specifically referred to in the custody or under the control of the said P. Lorillard Company, incorporated, in order to obtain information relevant to the aforesaid investigation of the Federal Trade Commission under the authority of the said act of Congress approved September 26, 1914.

45 In witness whereof, the Federal Trade Commission has caused this notice to be issued, signed by its secretary, and its official seal to be thereto affixed this 3rd day of March, 1922.

By the commission:

[SEAL.] (Signed) J. P. YODER,
Secretary.

I hereby certify that a duplicate original of the within notice and demand was duly served upon W. B. Rhett, secretary of the P. Lorillard Company, incorporated, on the 8th day of March, 1922, and that the said W. B. Rhett did then and there refuse to afford the undersigned access to the documentary evidence described in the notice and demand herein.

(Signed) JAMES A. HORTON,
Agent of Federal Trade Commission.

46 *Exhibit II to petition.*

P. LORILLARD COMPANY, INCORPORATED,
119 West 40th Street, New York, March 10, 1922.

Law department.

MR. JAMES A. HORTON,
Attorney and Examiner, Federal Trade Commission,
Washington, D. C.

MY DEAR MR. HORTON: I beg to acknowledge receipt from the Federal Trade Commission of an order of this company, under date of the third instant.

After examination of this order I do not see that we have anything to add to our letters on this subject, addressed to the Federal Trade Commission and to Mr. Williamson.

I am,

Very truly yours,

(Signed) W. R. BELL,
Legal Department.

47 *Exhibit I to petition.*

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION.

Docket No. 886.

In the matter of Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, its officers, directors, and members; Nelson F. Eberbach, its president; Harvey D. Narrigan and James Murphy, its vice presidents; Herman J. Krull, its treasurer; Paul L. Brogan, its secretary and their successors; Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd, and Morris Hochman, and their successors, directors of said association and together constituting its board of directors; Nelson F. Eberbach, John S. Eberbach, and Joseph H. Eberbach, partners doing business under the name and style A. B. Cunningham & Company; Dusel, Goodloe & Company, incorporated, a corporation; Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company; Frank Kuhn, George Kuhn, and John Kuhn, partners doing business under the name and style F. Kuhn & Brother; Peter J. Murphy and John Murphy, partners doing business under the name
48 and style Peter F. Murphy Company; Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull; Baum & Neely, incorporated, a corporation; William F. Shepherd and John G. Shepherd, partners doing business under the name and style S. Shepherd's Sons; T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company; F. Hartmann & Son, a corporation; Yahn & McDonnell Company, a corporation; M. Blumenthal; John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner and Sons; Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company; Victor Fermani; Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold; Frank Blatt; Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company; H. S. Moorhead, an individual doing business under the trade name Duncan & Moorhead; Bennett Hollard; P. Hochman; M. J. Dalton Company, a corporation; Brucker & Boghien, incorporated, a corporation; Fred G. H. Woerner, an individual doing business under the trade name Fred G. H.
49 Woerner & Sons; S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers; E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons; John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers; American Tobacco Company, a corporation; P. Lorillard Company, a corporation.

Complaint.

Acting in the public interest pursuant to the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that the Wholesale Tobacco & Cigar Dealers' Association, of Philadelphia, Pennsylvania, its officers, directors, members, and the various individuals, partnerships, and corporations named in the caption hereof, hereinafter referred to as respondents, have been and are using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of said act, and states its charges in that respect as follows:

Paragraph one. Respondent, Wholesale Tobacco & Cigar Dealers' Association, of Philadelphia, Pennsylvania, is a voluntary unincorporated association organized in the year 1920 by and composed of various individuals, partnerships, and corporations engaged in the business of selling at wholesale to wholesale and retail dealers cigars, cigarettes, and other tobacco products in the State of Pennsylvania and in neighboring States, in some instances doing a retail business in said commodities in addition to said wholesale business; said association is hereinafter called the association. Respondents Nelson F. Eberbach, Harvey D. Narrigan, James Murphy, Herman Krull, and Paul L. Brogan were the original officers of the association, holding the respective official positions set out in the caption hereof. They and their successors have continuously been and are now such officers administering the affairs of the association. Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd, and Morris Hochman were the original directors of the association and together constituted the original board of directors. They and their successors have continuously been and still are the directors and board of directors of the association, controlling and directing its affairs.

Group I.

The following-named respondents, with their several principal places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in selling one or more of the aforesaid tobacco products at wholesale to wholesale and retail dealers in several States of the United States. They cause said products when so sold to be transported from their respective places of business in said city of Philadelphia to said purchasers at various points in various States of the United States: Nelson F. Eberbach, John S. Eberbach, and Joseph H. Eberbach, partners doing business under the name and style of A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation organized under the laws of the State of New Jersey; Philip Godeski and Sidney G. Godeski, partners

doing business under the name and style Franklyn Tobacco Company; Peter J. Murphy and John Murphy, partners doing business under the name and style Peter F. Murphy Company; Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull; William D. Shepherd and John G. Shepherd, partners doing business under the name and style of S. Shepherd's Sons; T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company; Yahn & McDonnell Company, Incorporated, a corporation organized under the laws of the State of Pennsylvania; M. Blumenthal; John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons; Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company; Victor Fermani; Bennett Hollard; B. Hochman; M. J. Dalton Company, a corporation organized under the laws of the State of Pennsylvania; Brucker & Boghien, Incorporated, a corporation organized under the laws of the State of Pennsylvania; S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers; E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons.

51 Group II.

The following-named respondents, with their several places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in the business of selling one or more of aforesaid tobacco products at wholesale to wholesale and retail dealers wholly within the State of Pennsylvania: Frank Kuhn, George Kuhn, and John Kuhn, partners doing business under the name and style of F. Kuhn & Brothers; Baum & Neely, incorporated, a corporation organized under the laws of the State of Pennsylvania; Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold; Frank Blatt; Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company; H. S. Moorhead, an individual doing business under the trade name of Duncan & Moorhead; Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons.

Group III.

The following-named respondents, with their several principal places of business in the city of Camden, State of New Jersey, were at all times hereinafter mentioned and still are engaged in selling one or more of aforesaid tobacco products at wholesale to wholesale and retail dealers in several States of the United States. They cause said products when so sold to be transported from their several places of business in said city of Camden to said purchasers at points in various States of the United States: F. Hartmann & Son, a corporation

organized under the laws of the State of New Jersey; John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers.

All the foregoing respondents whose names are set out in Groups I, II, and III above were at all times hereinafter mentioned and still are members of the association and are hereinafter collectively referred to as the members. In the absence of the acts and things done by them, as more particularly hereinafter set out, they were and are naturally and normally in unrestricted competition with each other and with other dealers in aforesaid territory.

Respondent American Tobacco Company is a corporation organized under the laws of the State of New Jersey, with its principal
52 office in the city of Jersey City in said State and with factories in several of the United States. It was at all times hereinafter mentioned and still is engaged in the manufacture of cigars, cigarettes, and other tobacco products and the sale thereof to wholesale and retail dealers throughout the United States. It causes its products when so sold to be transported from the point of manufacture to said purchasers at points in other States of the United States. Amongst said purchasers are all the respondents set out in Groups I, II, and III above.

Respondent P. Lorillard Company is a corporation organized under the laws of the State of New Jersey, with its principal office in the city of Jersey City, in said State, and with factories in several of the United States. It was at all times hereinafter mentioned and still is engaged in the manufacture of cigars, cigarettes, and other tobacco products, and the sale thereof to wholesale and retail dealers throughout the United States. It causes its products when so sold to be transported from the point of manufacture to said purchasers at points in other States of the United States. Amongst said purchasers are all the respondents set out in Groups I, II, and III above.

Said manufacturers at all times hereinafter mentioned were and still are in competition with each other and with other individuals, partnerships, and corporations similarly engaged in the manufacture and/or sale of tobacco products in interstate commerce, except in so far as the same has been limited, prevented, or suppressed by the acts and things done by them and the other respondents herein as more particularly hereinafter set out.

Paragraph two: At the time of the organization of the association, the prices at which said manufacturers sold their products were fixed as follows: Said manufacturers severally supplied the members with a schedule of prices, denominated "list prices," which were the prices severally suggested by said manufacturers at which their products should be resold by the members to the retail trade. The prices at which said products were sold to the members were fixed by certain uniform discounts off said list in each instance, whereby the members paid to said manufacturers for said products

said list prices minus said discounts. Wholesale and retail dealers in tobacco products throughout the United States, including respondent dealers set out in Groups I, II, and III above, then were and still are dependent upon respondent manufacturers for their supply of a large portion of the products in which they deal. The extent of this dependence is such that when any such dealer is unable to secure the products of respondent manufacturers or either of them his business is substantially crippled, and he is placed at a competitive disadvantage with dealers supplied with said products. In the year 1920 the association and its members acting through the association and cooperating and conspiring with it, and with each other, agreed upon a schedule of fixed prices at which the members should thereafter resell to their dealer-customers the products dealt in by the members, including the products of respondent manufacturers, and having thus fixed said uniform resale prices, adopted a system for the maintenance and enforcement of said resale prices by the members and by all other wholesale dealers in the trade who did business within the territory served by the members. Respondent manufacturers cooperated and conspired with the association and its members and participated in said price maintenance system as is more particularly hereinafter set out. In the course of aforesaid cooperative enforcement of said system, the members, and the association through its officers and directors, did, amongst others, and still do, the following acts and things:

53 (a) Undertook among themselves to maintain said resale prices, and did maintain same;

(b) Caused the fixation of said resale prices to appear as the formal action of the association by an appropriate resolution in that behalf;

(c) Caused the association to notify all members of said action;

(d) Sought by persuasion and intimidation to cause all dealers in the territory above referred to, including those members of the association who discontinued the maintenance of said resale prices in violation of their aforesaid undertakings so to do, to maintain said resale prices;

(e) Sought and secured the cooperation of respondent manufacturers in such persuasion and intimidation, which each said manufacturer rendered by notifying the trade in aforesaid territory, by circular letters and otherwise, that the notifier would refuse to furnish further supplies of his products to any wholesale dealer who failed to resell such products at the prices fixed in aforesaid schedule, or implying the same in veiled language;

(f) Caused reports of the names of said dealers who failed to maintain said resale prices to be reported by the members and their salesmen, either directly to the association or through the respective members in each instance to the association, and upon receiving such reports, in turn reported the names of such offending dealers to re-

spondent manufacturers, requesting the assistance and cooperation of respondent manufacturers in the enforcement of said system by having said manufacturers refuse to further supply said offending dealers with any of their products;

(g) As a result of reporting said names to the respondent manufacturers and requesting their cooperation, as set out in specification (f) hereof, secured the cooperation and assistance of said manufacturers in that behalf, and each said manufacturer upon receiving such information proceeded to investigate said instances of price cutting, and upon finding that the offending dealer was cutting prices and refusing and failing to maintain aforesaid resale prices refused to furnish said offending dealer with further supplies of its, the manufacturer's, products until the offender gave such promises and assurances of maintaining said resale prices in the future as were satisfactory to said manufacturers and the association in that regard;

(h) Employed special agents to spy upon the members and other dealers in the aforesaid territory in order to ascertain if any of them were or was failing to maintain said resale prices, and upon discovering that a member or a dealer was so doing to report the name of such offender to the association. Upon receiving such reports, sought and secured the cooperation of the manufacturers with regard to said offenders in like manner and with like results as set out in specifications (f) and (g).

Paragraph three: The aforesaid acts and things done by respondents, and each of them, had and still have the tendency and capacity to constrain all wholesale dealers doing business in the territory above mentioned to uniformly sell the aforesaid products to their dealer-customers at the prices fixed by the association and its members as hereinbefore set out, and hence to hinder and suppress all competition in the wholesaling of said products in said territory, particularly among the members of the association, and, further, to hinder and restrict competition between all retail dealers in said territory. Respondents' said practices thus tended and still tend to unduly hinder and obstruct the free and natural flow of commerce in the channels of interstate commerce.

54

Paragraph four: The above acts and things done by respondents and by each of them constitute unfair methods of competition in commerce within the intent and meaning of section 5 of an act of Congress entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Wherefore, the premises considered, the Federal Trade Commission on this 29th day of May, A. D. 1922, now here issues this its complaint against said respondents and each of them.

Notice.

Notice is hereby given you, Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, and you its officers, di-

rectors, and members named in the caption hereof, respondents herein, that the 18th day of July, A. D. 1922, at 10.30 o'clock in the forenoon is hereby fixed as the time, and the offices of the Federal Trade Commission, in the city of Washington, D. C., as the place, when, and where a hearing will be had on the charges set forth in this complaint at which time and place you shall have the right under said act to appear and show cause why an order should not be entered by said commission requiring you to cease and desist from the violation of the law charged in this complaint.

In witness whereof the Federal Trade Commission has caused this complaint to be signed by its secretary, and its official seal to be hereto affixed at Washington, D. C., this 29th day of May, 1922.

By the commission.

[SEAL.] J. P. YODER, *Secretary.*

55 *Affidavit of James A. Horton.*

In United States District Court.

[Title omitted.]

CITY OF WASHINGTON,
District of Columbia, ss:

JAMES A. HORTON, being duly sworn, says that he is, and at all of the times herein mentioned was, a duly authorized agent and accredited representative of the Federal Trade Commission.

That upon the dates herein set forth he as such duly authorized agent of the Federal Trade Commission did at reasonable times and during the usual business hours present himself in person at the premises known as 119 West 40th Street, Borough of Manhattan, city, county, and State of New York, at the office or place of business there maintained by P. Lorillard Company, Inc., the defendant named in the above-entitled proceedings, and did then and there present his credentials as the duly authorized agent of the aforementioned Federal Trade Commission, and as such did request and demand access to the books, papers, documents, memoranda, and correspondence as set forth in the written demand answered and made a part of this affidavit dated March 3, 1922.

56 That the demand made by deponent as herein set forth was made as aforesaid on March 8, 1922.

That the defendant then and there refused to accede to or comply with the demands so made and affirmatively and unequivocably refused to give deponent access to the records referred to and refused to permit deponent to inspect or examine them or any part of them at that time or at any other time.

That the communication known as Exhibit H, annexed to the petition herein, is addressed to deponent from defendant's counsel,

and therein defendant's refusal to permit examination or inspection of its records herein referred to is reiterated.

JAMES A. HORTON.

Subscribed and sworn to before me this 31st day of May, 1922.

[SEAL.] WARREN R. CHOATE,
Notary Public.

My commission expires April 5, 1923.

57 *Affidavit of J. P. Yoder.*

[Title omitted.]

CITY OF WASHINGTON,
District of Columbia, ss:

J. P. YODER, being duly sworn, says that he is and at all of the times herein mentioned and also at all of the times mentioned in the petition and in the affidavit of James A. Horton, in the above entitled proceeding, was the secretary of the relator, the Federal Trade Commission, and as such has the custody and control of the records of said commission, including its books of record, correspondence, etc.

That he has read the petition herein and the exhibits annexed to and a part thereof and also the affidavit of James A. Horton, verified ——, 1922.

That said James A. Horton was at all times mentioned in said petition and affidavit and still is a duly authorized agent and accredited representative of the Federal Trade Commission.

58 That the copy of the notice and demand addressed to P. Lorillard Company, Inc., annexed to and a part of said petition and affidavit, is a true and correct copy of the original thereof, and that the same was drawn and delivered to the P. Lorillard Company, Inc., pursuant to the order and direction of the Federal Trade Commission.

Deponent further says that the copies of the Exhibits A, B, etc., are true and correct copies of the originals thereof.

J. P. YODER.

Subscribed and sworn to before me this 31st day of May, 1922.

[SEAL.] WARREN R. CHOATE,
Notary Public.

My commission expires April 5, 1923.

59 *Affidavit of Henry Miller.*

In United States District Court.

[Title omitted.]

CITY OF WASHINGTON,
District of Columbia, ss:

HENRY MILLER, being duly sworn, says that he is an attorney and examiner, and at all of the times herein mentioned was in the em-

ploy of the Federal Trade Commission; that on or about October 6, 1921, he was directed to and did call at the office of the P. Lorillard Company, Inc., at premises known as 119 West 40th Street, in the city of New York, Borough of Manhattan, State of New York, for the purpose of inspecting and examining the records, papers, documents, and correspondence of said company. That at that time and place he saw Thomas J. Maloney, president of respondent.

That he stated to said president that he, deponent, as a representative and duly accredited agent of the Federal Trade Commission, presented himself for the purpose of inspecting the records, papers, documents, and correspondence of the P. Lorillard Company, Inc., and that he desired that he be given access to the files of the company for that purpose.

60 That said Thomas J. Maloney at that time and place refused to permit deponent to have access to the files containing the records, correspondence, and documents relating to respondent's business in interstate commerce, and at that time and place said Thomas J. Maloney stated to deponent that he desired a letter or a demand in writing from the Federal Trade Commission. Deponent thereupon so reported to the Federal Trade Commission, and a demand in writing, addressed to respondent, dated October 6, 1921, copy of which is annexed to the petition in the above-entitled proceeding. That deponent thereupon in person duly presented said demand in writing to Thomas J. Maloney on October 7, 1921, at his office at 119 West 40th Street, aforesaid, at which time and place said Thomas J. Maloney again refused to permit deponent to have access to the files of said company or to any of its papers, documents, or correspondence.

Deponent stated to said Thomas J. Maloney that the American Tobacco Company had stated that it would permit inspection and examination of the correspondence with its salesmen pending determination as to whether it would consent to a like examination of the correspondence with its jobber customers, and deponent suggested that a like arrangement be made with the P. Lorillard Com-

61 pany, Inc. Said Thomas J. Maloney thereupon stated to deponent that it was impossible to make any such arrangement because there was no segregation of the correspondence with the jobber and the salesman, but that that correspondence was intermingled in one file, and that access to the file would give access to all of the correspondence of the P. Lorillard Company, Inc., not only with its salesmen but also to and from its jobbers.

HENRY MILLER.

Subscribed and sworn to before me this 1st day of June, 1922.

[SEAL.] WARREN R. CHOATE,
Notary Public.

My commission expires April 5, 1923.

62 *Note of issue.*

Motion calendar for June 23, 1922.

U. S. District Court, Southern District of New York.

[Title omitted.]

WILLIAM HAYWARD, *U. S. Attorney,*
Solicitor for Petitioner,
Federal Courts and Post Office Bldg., N. Y. C.

Date of issue.

Nature of action: In equity for writ of mandamus directing defendant to deliver for inspection and examination certain books, etc., etc.

Note of issue for June 23, 1922.

Calendar motion for writ of mandamus under Federal trade act.

Filed by the United States.

63 *Stipulation extending time.*

United States District Court, Southern District of New York.

[Title omitted.]

It is hereby stipulated and agreed that the time of the above-named respondent to move, answer, or demur to the petition herein be, and the same is hereby, extended to and including July 6, 1922.

Dated New York, June 23, 1922.

WM. HAYWARD,
U. S. Attorney, Attorney for Petitioner.
GUTHRIE, JEROME, RAND & KRESEL,
Attornies for Respondent.

So ordered.

ALEX. GILCHRIST,
Clerk.

64–65 *Answer and objections.*

United States District Court, Southern District of New York.

[Title omitted.]

P. Lorillard Company, Inc., the respondent above named, by Guthrie, Jerome, Rand & Kresel, its attorneys, objecting to and answering the petition herein for a writ of mandamus of the Federal Trade Commission, verified May 31, 1922, alleges and sets forth as follows:

I.

1. It alleges and submits that the said petition of The Federal Trade Commission is insufficient in law on the face thereof and that

it does not state facts sufficient to entitle the petitioner to relief by way of writ of mandamus as prayed for therein.

II.

And further separately objecting to and answering the petition herein for a writ of mandamus the respondent:

2. Admits the allegation in paragraph 4 of the petition
66 that it is engaged in the manufacture of tobacco and tobacco products and in the sale thereof in the several States and Territories of the United States, but denies that all of its said business is carried on in interstate commerce, and alleges, on the contrary, that a large part thereof is wholly intrastate commerce.

3. Admits the allegation in paragraph 5 of the petition that in the conduct of its business it keeps and maintains an office at the premises known as No. 119 West 40th Street in the Borough of Manhattan, city, county, and State of New York, but alleges that the business there conducted by it is partly interstate and partly intrastate commerce.

4. Admits the allegation in paragraph 6 of the petition that it keeps and has at its said office in the custody and control of its officers, agents, or employees, books, documents, papers, writings, correspondence and other documentary data relating to its said business, but alleges that a large part thereof relates solely to its business in intrastate commerce, and denies all the other allegations contained in said paragraph of the petition.

5. Admits the existence of the Federal Trade Commission act and the phraseology thereof, as set forth in the authorized editions of the Federal Statutes, but denies each and every other allegation in paragraphs 7 and 8 of the petition, and further denies that said act, as properly and duly interpreted or construed, confers upon the Federal Trade Commission the powers or imposes upon said commission or respondent the duties or has the scope, meaning, or effect alleged in said petition.

6. Denies that it has any knowledge or information sufficient to form a belief of the allegations contained in paragraphs 9 and 10 of the petition.

7. Denies that it has any knowledge or information sufficient to form a belief of the allegations or any of them contained in paragraph 12 of the petition, but denies that the petitioner has
67 or that there is any reason to believe, that the respondent has at any time used any unfair method or methods of competition.

8. Denies that it has any knowledge or information sufficient to form a belief of the allegations contained in paragraph 13 of the petition, except the allegation that the petitioner, by its agents and representatives, has heretofore investigated the respondent's business and affairs.

9. Admits the allegations contained in paragraph 15 of the petition, except that it denies the allegation that it was under any duty to produce and permit the inspection and copying of the books, documents, and papers heretofore exhibited by it to the petitioner and its representatives.

10. Denies that any refusal on its part to produce documentary evidence as alleged in paragraph 16 of the petition was in violation of its duty or of said Federal Trade Commission act.

11. Denies that the documentary evidence, records, correspondence, and writings referred to in paragraphs 17 and 24 of the petition related to the respondent's business in interstate commerce, and alleges, to the contrary thereof, that a large part thereof did not relate to such interstate business, but wholly to its intrastate business.

12. Admits that it addressed a communication in writing to the petitioner under date of October 21, 1921, as alleged in paragraph 25 of the petition, and prays leave to refer to the same when produced in court for its true purport and legal effect, but denies that the true tenor, purport, and effect of such communication are as in said paragraph alleged.

13. Admits that it now refuses to permit the petitioner or its agents and representatives to have access to or make copies of the records specified in Exhibit G of the petition, and that it has heretofore refused to permit such access to and copying of part of
68 said records, but denies all the other allegations contained in paragraph 32 of the petition.

14. Admits the allegations contained in paragraph 33 of the petition, except that it denies that the petitioner's said preliminary report of January 17, 1922, to the United States Senate truly sets forth or represents the facts concerning this respondent developed by its said investigation of respondent's business and affairs.

15. Denies each and every allegation contained in paragraph 37 of the petition and alleges that said Senate resolution No. 129 affords no warrant or authority in law for granting to the petitioner any of the relief prayed by it in its petition.

16. Denies each and every allegation contained in paragraphs 38, 39, 41, and 43 of the petition.

17. Denies the allegations contained in paragraph 42 of the petition that any complaint by the Federal Trade Commission was served upon it on May 31, 1922, but admits that the complaint in said paragraph referred to was served upon it on June 6, 1922.

III.

And further separately objecting to and answering the petition herein for a writ of mandamus, the respondent alleges that—

18. The demands for access to and inspection of the records, memoranda, reports, documents, contracts, papers, and correspondence of the respondent, heretofore made by the petitioner upon the respondent and now attempted to be enforced through the order and

writ of this court, are unauthorized, illegal, unconstitutional, and void in that:

(1) They, and the orders of the petitioner purporting to authorize or warrant them, and the said Federal Trade Commission act,
69 in so far as it purports to authorize them, are and amount to an unreasonable search and seizure of the respondent's papers and effects without any warrant or other due process of search therefor, and without probable cause, and without due and proper support in oath or affirmation, and without basis in any complaint charging a specific wrongful act or offense, and without due and particular description of the papers whose compulsory production and disclosure is sought, and are unreasonable and arbitrary in scope, extent, and effect, in violation of the fourth article of amendment to the Constitution of the United States, and would, if enforced, deprive the respondent of its liberty and property without due process of law, in violation of the fifth article of amendment to the Constitution of the United States.

(2) Said demands, and the orders of the petitioner purporting to authorize or warrant them, and the said Federal Trade Commission act, in so far as it purports to authorize them, are and constitute an undue, unreasonable, and arbitrary interference with the business which the respondent conducts in intrastate commerce, and a deprivation of its liberty and property without due process of law in violation of the fifth and tenth articles of amendment to the Constitution of the United States.

(3) Said demands and the orders of the petitioner purporting to authorize or warrant them are and were made by the petitioner with and for the purpose of carrying out and complying with resolution No. 129 of the United States Senate, referred to in the petition, and not in fact for any purpose lawfully authorized in and by said Federal Trade Commission act.

(4) Said demands and the orders of the petitioner purporting to authorize or warrant them are unreasonable, arbitrary, and oppressive because made and pressed after and notwithstanding the fact that access to and inspection of all of the respondent's books,
70 papers, documents, correspondence, records, reports, and memoranda have heretofore and in or about May, 1922, been accorded to and availed of by the Department of Justice of the United States for the purpose of investigating whether the respondent was or had been guilty of or concerned in any violation of the said Federal Trade Commission act or any of the so-called "anti-trust acts," as the same are defined in and by said Federal Trade Commission act.

(5) Said demands and the orders of the petitioner purporting to authorize or warrant them are made without basis in any complaint charging any specific wrongful act or offense or any violation of law within the jurisdiction of the petitioner.

(6) Said demands and the orders of the petitioner purporting to authorize or warrant them are made in the course of a general in-

quiry by the petitioner without first having requested, received, and found false, inaccurate, or incomplete any reports of the respondent made in respect of the subject matter of such inquiry, and are not limited to the particular matters duly determined by the petitioner so to be false, inaccurate, or incomplete in such reports.

(7) Said demands and the orders of the petitioner purporting to authorize or warrant them, if enforced as prayed by the petitioner, would operate to deny to the respondent, in practical effect and beforehand, a due and proper opportunity to assert and have protected by the court any privilege or immunity which it may have to prevent the inspection and copying of any particular writing or paper demanded, as well as any due and proper opportunity to prevent, and be protected by the court from permitting, the inspection and copying of irrelevant writings and papers, and the unauthorized and illegal compulsory disclosure or subsequent publication by the petitioner of what constitute in fact trade secrets and other private matters.

71 IV.

And further separately objecting to and answering the petition herein for a writ of mandamus, the respondent alleges that—

19. The granting of the relief prayed for by the petitioner would not be equitable or just or necessary or in the exercise of a wise judicial discretion.

Wherefore it is prayed that the petitioner's application for a writ of mandamus be denied and that the petition in this proceeding or controversy be in all respects dismissed.

GUTHRIE, JEROME, RAND & KRESEL,
Attorneys for respondent.

Office and post office address, 37 Wall Street, Borough of Manhattan, city of New York.

WILLIAM D. GUTHRIE, *Of Counsel.*

STATE OF NEW YORK,
County of New York, ss:

THOMAS J. MALONEY, being duly sworn, deposes and says:

I am the president of the P. Lorillard Company, Inc., the respondent in the above-entitled proceeding. I have read the foregoing answer to the petition of the Federal Trade Commission, and know the contents thereof, and the same is true to my own
72 knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters I believe it to be true.

THOMAS J. MALONEY.

Sworn to before me this 5th day of July, 1922.

[NOTARIAL SEAL.] S. E. SPENCE,
Notary Public.

New York Co., No. 361, New York Register No. 3008.

Service admitted.

U. S. District Court, S. D. of N. Y. Filed Jul. 5, 1922.

73 *Stipulation for adjournment.*

In the District Court of the United States for the Southern District of New York.

[Title omitted.]

It is hereby stipulated and agreed that the argument of the motion in the above-entitled proceeding which is now set for August 3, 1922, shall, with the consent of both parties, be adjourned to September 7, 1922 (or the first regular motion day after the first of September), all parties thereto specifically agreeing that no further adjournment for argument will be requested by any party for any cause whatsoever.

Dated July 12, 1922.

WILLIAM HAYWARD,
Attorney for Petitioner.
GUTHRIE, JEROME, RAND & KRESEL,
Attorneys for Respondent.

74–75 *Affidavit of Thomas J. Maloney.*

In the United States District Court for the Southern District of New York.

[Title omitted.]

STATE OF NEW YORK,
County of New York, ss.:

THOMAS J. MALONEY, being duly sworn, deposes and says:

I.

P. Lorillard Company (hereinafter referred to as the "company") is a corporation which was organized in November, 1911, under the laws of the State of New Jersey. Its home office is located at the corner of Newark Avenue and Senate Place, Jersey City, New Jersey, and its executive offices are located at 119 West 40th Street, New York City.

I have been president of this company since its organization, and I am familiar with its business and affairs.

76 II.

The company is engaged in the business of manufacturing tobacco products, and it sells such products partly in interstate and partly in intrastate commerce. In the conduct of its business it maintains and operates the following factories:

Name of factory.	Product.
Marion Branch, Jersey City, N. J	Tobacco and cigarettes.
Middletown Branch, Middletown, Ohio	Tobacco.
Louisville Branch, Louisville, Ky	Tobacco.
S. Anargyros, New York City, N. Y	Cigarettes.
First St. Branch, Jersey City, N. J	Cigars and little cigars.
144th St. Branch, New York City, N. Y	Little cigars.
Baltimore Branch, Baltimore, Md	Little cigars.
Danville Branch, Danville, Va	Little cigars.
Whitlock Branch, Richmond, Va	Little cigars.
Old Virginia Branch, Richmond, Va	Preparing leaf.
Banner Branch, Lancaster, Pa	Cigars.
Wilmington Branch, Wilmington, Del	Cigars.
New York Branch, New York City, N. Y	Cigars.
Newark Branch, Newark, N. J	Cigars.

77 In addition the company maintains a large leaf buying and rehandling organization for the purpose of securing raw material. Such rehandling plants and rebuying agencies are located as follows:

Baltimore Leaf Dept., Baltimore, Md.
Connecticut Leaf Dept., Windsor, Conn.
Kentucky Leaf Dept., Louisville, Ky.
Lancaster Leaf Dept., Lancaster, Pa.
Middletown Leaf Dept., Middletown, Ohio.
Richmond Leaf Dept., Richmond, Va.
Old Virgina Branch, Richmond, Va.
Wisconsin Leaf Dept., Madison, Wis.
LaCrosse Leaf Dept., La Crosse, Wis.
New York Leaf Dept., New York City.

Its tobacco products consist of all forms of manufactured tobacco, except snuff. It sells these products throughout the States and territories of the United States.

The customers of the company number approximately six thousand five hundred (6,500). These customers consist of corporations, partnerships, and individuals, and in respect to each of the three named classes, part are engaged in interstate commerce and part in intrastate commerce, and some of them in both interstate and intrastate commerce. A large part of the sales made by said company are wholly in intrastate commerce. As shown by comparative statement hereto attached and marked "Exhibit A," approximately 30% of the company's business is intrastate and the remainder interstate.

On December 31, 1921, the corporation had outstanding the following securities, consisting of stocks and bonds, the par value of which is as follows:

5% debenture bonds	$10,617,450
7% debenture bonds	10,084,350
7% cumulative preferred stock	11,307,600
Common stock	30,304,800

78 III.

The business of the company is divided into three principal departments.

(a) Department of manufacturing: This is the principal department of the company and produces and manufactures all kinds of cigars, cigarettes, plug, chewing, smoking, and fine cut tobaccos. It operates fourteen (14) factories at the places hereinabove set forth and employs at such factories several thousand persons.

(b) Leaf department: This department purchases all leaf tobacco for the company. The principal part of this material is obtained in the United States in the various tobacco centers, but a large percentage of its purchases consists of high-grade Turkish tobacco, which is imported into the United States.

(c) Sales department: This department is charged with the duty of disposing of the products of the company. It has a large organization, which is necessary in order to sell and distribute the products of the company.

The operations of the company's business in the purchase of raw material and its manufacture into finished product and final distribution are in charge of an executive personnel consisting of the following officers: One president, five vice presidents, one secretary-treasurer, one assistant secretary-treasurer, one chief auditor.

79 The company employs over ten thousand (10,000) persons, including clerical assistants, factory and warehouse superintendents and workers, and a large sales force.

The total distribution of the finished products of the company for the year 1921 represented a sales value of eighty-four million three hundred thirty-one thousand two hundred seventy-three and 92/100 dollars ($84,331,273.92). These products may be classified as follows:

Name.	Quantity.	Value.
Cigarettes	2,726,930,064	$26,600,807.6
Cigars	187,112,301	8,537,298.6
Cheroots	105,924,676	2,213,048.9
Little cigars	527,201,396	7,937,932.7
Fine cut tobacco	1,606,794 lbs.	1,388,838.9
Smoking, plug, chewing tobacco	59,253,067 lbs.	37,653,949.3

The company paid to the Federal Government, Department of Internal Revenue, twenty-two million five hundred ten thousand five hundred seven and 19/100 dollars ($22,510,507.19) for stamps to be attached to its products manufactured in its plants during that period. This sum excludes all import duties, Federal income and excess-profit taxes, capital-stock tax, and the various State and municipal taxes imposed in jurisdictions where the property of the company is located.

In the final distribution of its products the company employs a force of approximately nine hundred (900) salesmen, operating in various parts of the United States. Their duties consist of calling upon and soliciting orders from the customers of the company throughout the United States. The goods ordered are then shipped from one of its factories or warehouses which is nearest the place of delivery specified by the customer. However, a large number
80 of orders for goods are sent by customers to our New York office, whereupon instructions are given as to their disposal. As hereinabove shown, approximately 30% of these orders constitute intrastate commerce.

The company keeps the customary books and records, and has the correspondence and other documentary data which usually characterize a business of this magnitude. In order properly to take care of all of the correspondence, books, and records, a large number of employees are required in the executive offices of the company. In addition to the executive personnel specified above, there are two hundred forty-nine (249) employees in the New York office alone.

The operation of this business is a tremendous undertaking. As stated above, the books show that the company has approximately six thousand five hundred (6,500) customers, consisting largely of individuals and partnerships, carrying on business in various parts of the United States. In order properly to care for the needs of these customers, thousands of letters are written to and from them and to and from the different members of our organization. More than half of this correspondence relates to transactions in intrastate commerce and with individuals and partnerships not subject to the terms and provisions of the Federal Trade Commission act.

The ultimate object of the company is to place its products in the hands of the consumer. To accomplish this result it is customary, as well as necessary, to sell all its goods to wholesalers or jobbers carrying on business in various parts of the United States. The company depends upon them as its principal means of distribution. The wholesaler or jobber purchases from the company and then in turn sells to the retailer, and the retailer finally distributes the finished product to the consumer. Therefore the efforts of the sales force are chiefly spent in selling to wholesalers or jobbers and not to the retailer or consumer.

81 IV.

One of the principal assets of the company is the value of its good will, trade marks, and brands, which it has developed through years of effort directed towards producing quality, expenditure of millions of dollars, and the reputation of the company. When a new brand is placed on the market, it is necessary to advertise it extensively by means of newspapers, magazines, trade periodicals, billboards, and otherwise.

V.

Since September, 1918, the Federal Trade Commission, acting through its representatives, has at various times investigated the business and affairs of the company.

In October, 1918, the commission, at the request of the War Industries Board, set about to ascertain the cost of producing various brands of cigarettes and tobacco, particularly those brands which were being furnished by the company for the use of the Army and Navy during the war. This request and the investigation which followed were exhaustive in scope. It was necessary for the officers and employees of the company to spend a great deal of time and effort to prepare these reports for the commission. Our willingness to cooperate is shown by the fact that a full and complete report was sent to the commission on the 14th day of October, 1918. This report should now be in the possession of the commission and readily accessible to it.

On July 20th, 1920, the commission, acting through one of its representatives, continued an examination into the business and affairs of the company and sent a questionnaire to the company outlining the scope of the inquiry. The company, under date
82 of August 27th, 1920, furnished information in answer to said questionnaire, which related to the effect of Tobacco Products Corporation's methods of doing business, in so far as it effected competition between this company and said corporation. The company further supplied all price lists requested, the names of certain of its largest customers, the amount of their purchases, and discounts or rebates allowed to each one of them. This report should now be in the possession of the commission and readily accessible to it.

In the fall of 1921 the Federal Trade Commission applied to the company for leave to inspect and make copies of all its books and papers of every kind whatsoever for the purpose, as stated by the representatives of the commission, of making a report in response to Senate Resolution No. 129. At this time the representatives of the commission were given access to and examined, to the full extent they desired, all the books and records of this company, except the correspondence which this company had written or received. Such privilege was accorded to the commission, not because the company was in duty bound to afford it but because it had been its custom to cooperate with the commission. When it came, however, to allowing the commission to examine and make copies of correspondence, papers, and documents which affected persons who are dealing with or have dealt with the company, it was determined that the company had no right in any event to allow such examination without either the consent of the other persons affected or the order of a court of competent jurisdiction after a full hearing, especially as the company regarded the asserted power of the commission for such purpose as unwarranted by the act creating the Federal Trade Commission and in violation of the Constitution of the United States.

The demand of the commission and the action of the company in response thereto is set forth accurately in the following communications:

83 (1) Letter of Millard F. Hudson, chief examiner, of the Federal Trade Commission to the company, dated October 6, 1921.

(2) Letter of W. B. Bell, counsel for the company, to the said chief examiner, dated October 17, 1921.

(3) Notice and demand of the commission on the company, dated October 17, 1921.

(4) Letter of W. B. Bell, counsel for the company, to the commission, dated October 21, 1921.

(5) Letter of said chief examiner to the company, dated October 21, 1921.

(6) Letter of Hon. Husted Thompson, chairman of the Federal Trade Commission, to the said Bell, dated October 26, 1921.

(7) Letter of the said Bell to Hon. Husted Thompson, chairman, dated November 10, 1921.

(8) Letter of Rush H. Williamson, special assistant to the Attorney General, to Mr. W. R. Perkins, dated January 19, 1922.

(9) Letter of said Bell to the said Mr. Williamson, dated February 3, 1922.

(10) Notice and demand of the Federal Trade Commission on the company, dated March 3, 1922.

(11) Letter of the said Bell to Mr. James A. Horton, attorney and examiner of the Federal Trade Commission, dated March 10, 1922.

(12) Letter of the said Mr. Bell to Mr. W. H. Fuller, general counsel of the Federal Trade Commission, dated April 24, 1922.

A true and complete copy of each of the above-mentioned documents is hereto annexed, marked "Exhibits B" to "M," inclusive, and made parts hereof.

VI.

The commission's petition herein alleges, and the company's answer admits, that a complaint was served by the commission on the

84 Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pa., its officers, directors, and members, P. Lorillard Company and others, which complaint is attached to the said petition and marked "Exhibit I." Since this complaint was served, no demand has been made by the commission for any books, records, correspondence, documentary data, etc., relating to the company's business transactions with the persons named in said complaint, or any other persons doing business in Philadelphia. The company is willing to produce for the hearing on this complaint its documentary evidence relating to said complaint whenever due demand is made by the commission or is authorized by a court of competent jurisdiction.

In reference to the complaint filed by the Federal Trade Commission against P. Lorillard Company and the Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, which complaint was

served on us June 6th, 1922, the company has denied all of the material allegations of that complaint in so far as such allegations relate to the company. A copy of this answer is hereto attached, marked "Exhibit N," and made a part hereof. Reference thereto shows that the company has specifically denied any acts or conduct which could be construed as an unfair method of competition as alleged in said complaint.

VII.

The notice and demand of the commission, which is incorporated in the petition herein, marked "Exhibit G," is very broad in its scope. The quantity and extent of the correspondence therein requested is specifically described in the affidavit of William B. Leonard, auditor of the company, which is filed herewith.

The officers of the company have previously offered to give the commission access to its books and records and all of its correspondence with its sales force, but have refused to give access to
85 correspondence with its customers. The demand further requests copies of agreements, arrangements, and understandings existing between the company and other corporations therein named. This demand was not complied with for the reason that no such agreements exist between this corporation and any one of the corporations specified in subdivision 6 of the demand.

VIII.

I have read the attached affidavit of William B. Leonard, auditor of the company, and the facts therein stated are true of my own knowledge.

THOMAS J. MALONEY.

Subscribed and sworn to before me this 1st day of September, 1922.

H. S. IVIE.
Notary Public.

New York Co. No. 17, New York Register No. 3013.

86 *Exhibit A to Maloney's affidavit.*

ANALYSIS OF SALES, 1921.

Total sales, domestic and export	$83,134,126.02
Less export sales	53,823.38
	83,080,302.64
Intrastate sales	25,181,089.35
Interstate sales	57,899,213.29

Exhibit B to Maloney's affidavit.

[Omitted. Printed side page 30.]

87 *Exhibit C to Maloney's Affidavit.*

OCTOBER 17, 1921.

Mr. MILLARD F. HUDSON, *Chief Examiner,*
Federal Trade Commission,
Washington, D. C.

DEAR SIR: Replying to your letter of October 6th, 1921—"file 1-2538—Sen. Res. 129, August 9, 1921"—which has been referred to this department for attention.

Your statement that under the organic act the commission is not permitted to make public trade secrets or names of customers does not entirely answer our objection to turning over to your examiners our correspondence with our customers. Amongst other
88 things, for example, this still leaves open the possible use of this correspondence against the customers themselves. Hence you will see how, notwithstanding your statement, your demand remains a matter of serious embarrassment to this company.

In order to give the matter intelligent consideration we feel that we should have more information than has yet been given us as to the inquiry in which the correspondence is desired. For instance:

What is the basis, the source of the inquiry? You refer to Senate resolution 129, so we presume the inquiry is simply a carrying out of the direction contained in that resolution. But you do not say so, and we would like to have confirmation of this.

What is the object of the inquiry? We feel that accurate knowledge here will assist us.

And now that we are corresponding on the subject, will you not yourself write us just what is the scope of the inquiry?

The course of this company with respect to previous requests of the commission for information will assuredly make plain to you that we are not raising objection merely for objection's sake. On the contrary, even now an investigation is being made into the books of this company by several representatives of the commission. Indeed, so extensive have Federal inquiries into the affairs of this company become that a room has been practically set aside at the office for this purpose.

But when it comes to imparting information which may affect third parties this presents to our mind a question of a different character which requires very serious consideration in the light of all the existing facts. We will therefore very much appreciate your full and frank reply.

If the commission has entered any orders relating to this inquiry, will you please send us certified copies of the same, and we will promptly remit proper cost and charges for same as soon as we know the amounts.

Very truly yours,

(Signed) W. B. BELL.

89–90 *Exhibit D to Maloney's affidavit.*

[Omitted. Printed side page 31.]

91 *Exhibit E to Maloney's affidavit.*

OCTOBER 21, 1921.

THE FEDERAL TRADE COMMISSION
OF THE UNITED STATES OF AMERICA,
Washington, D. C.

DEAR SIRS: There has been referred to me for attention your "Notice and demand," dated October 17, 1921, handed to an officer of this company and requesting certain things of the company.

In going over this demand I find that it is practically the same as the demand previously made on this company by Mr. Hudson, your chief examiner, as to which we have already written Mr. Hudson, under date of the 17th inst. The only new thing disclosed is your statement that an application for a complaint against this company has been made. In addition to furnishing the information requested of Mr. Hudson, will you kindly let us know the name of the applicant for the complaint and the facts with respect thereto as shown by the file to which you refer.

As soon as we have in hand the information requested in this and our previous letter we shall be glad to let you hear from us.

Very truly yours,

W. B. BELL.

92 *Exhibit F to Maloney's affidavit.*

FEDERAL TRADE COMMISSION,
Washington, 21 October, 1921.

P. LORILLARD COMPANY,
119 West 40th Street, New York City.

(Attention W. B. Bell.)

GENTLEMEN: Your letter of the 17th inst. in response to our letter of October 6th regarding the examination of your correspondence files has been received and noted.

You are aware, no doubt, that since your letter was written the secretary of your company has been served with the commission's formal demand for access to your records and files. No orders of the commission have been adopted with the exception of the notices of demand referred to and the resolution of the commission authorizing the investigation. Under Senate resolution and the application for a complaint against your concern pending before the commission charging resale price maintenance it would appear necessary to examine all records and correspondence of your company, including the correspondence you have had with or from jobbers of your products.

It is noted and regretted that Federal inquiries have caused you inconvenience. In this regard we can assure you that in this inquiry, when access is granted, the examination will be made as speedily as possible and with as little inconvenience to you as
93 is absolutely necessary. For example, if you so desire, we can have all letters selected from your files by our agents copied at this office, thus removing the necessity of your stenographic force doing this for us.

Your reply as to the commission's demand is awaited, a franked envelope being enclosed herewith for your use in replying.

Very truly yours,

FEDERAL TRADE COMMISSION,
MILLARD F. HUDSON,
Chief Examiner.

Encl.

94–96 *Exhibit G to Maloney's affidavit.*

[Omitted. Printed side page 34.]

97–100 *Exhibit H to Maloney's affidavit.*

[Omitted. Printed side page 38.]

101 *Exhibit I to Maloney's affidavit.*

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, January 19, 1922.

W. R. PERKINS, Esq.,
511 Fifth Avenue, New York City.

MY DEAR MR. PERKINS: Referring to our conversation of some time since with reference to the examination of certain files of the Lorillard Company containing correspondence passing between that company, its officers and employees, and jobbers of tobacco in various sections of the country, I would advise that after conferring with the Attorney General's office it is not deemed advisable, nor is it believed that it will prove satisfactory, to make the proposed examination partial and subject to the restrictions indicated by you at our conference.

102 I might add that it is further felt that it falls within the duty of the department under existing conditions to have a full and unrestricted examination made of the files in question.

Such being the case, will you please advise me at your earliest convenience whether the Lorillard Company will make these files available for an unrestricted examination by this department?

Yours very truly,

RUSH H. WILLIAMSON,
Special Assistant to the Attorney General.

Exhibit J to Maloney's affidavit.

FEBRUARY 3, 1922.

Mr. RUSH H. WILLIAMSON,
Special Assistant to Attorney General,
United States Attorney's Office, New York City.

DEAR SIR: I have for attention yours of the 19th ultimo to Mr. Perkins, and he has told me in substance the conversation to which you refer. I do not see that there is anything that I can add. The Federal Trade Commission has thoroughly examined the books and records of the Lorillard Company. It has been offered the privilege of a like examination of the correspondence passing between the officers and employees of that company. It has been advised that in the event the commission will designate any one or more customers of the company whose correspondence it wishes to examine the company will take the matter up with these customers in an endeavor to secure their consent to the examination, and the examination
103–106 will be allowed if the consent is obtained. Further than that would be allowing a general examination into the correspondence of customers with the company without the knowledge or consent of the customers and without the sanction of any order of court. We feel that yielding to such an examination might seriously prejudice the company with its customers, and therefore that no such examination should be made unless and until it is ordered by a court after a hearing.

Yours very truly,

W. B. BELL.

Exhibit K to Maloney's affidavit.

[Omitted. Printed page 41.]

107 *Exhibit L to Maloney's affidavit.*

MARCH 10, 1922.

Mr. JAMES A. HORTON,
Attorney and Examiner,
Federal Trade Commission, Washington, D. C.

MY DEAR MR. HORTON: I beg to acknowledge receipt from the Federal Trade Commission of an order to this company under date of the third instant.

After examination of this order, I do not see that we have anything to add to our letters on this subject addressed to the Federal Trade Commission and to Mr. Williamson.

I am,

Very truly yours,

W. B. BELL,
Legal Department.

108 *Exhibit M to Maloney's affidavit.*

APRIL 24, 1922.

Mr. W. H. FULLER,

Counsel Federal Trade Commission, Washington, D. C.

DEAR MR. FULLER: Mr. Perkins has told me of the conference occurring on the morning of last Thursday, at which were present yourself and Mr. Barnes, representing the commission; Mr. Guyler and Mr. Williamson, representing the Department of Justice; and Mr. Parker and Mr. Perkins, for the American Tobacco Company and this company, respectively, the subject of the conference being the examination by the commission of the correspondence of these tobacco companies with their customers.

I have now discussed the situation with the officials of the Lorillard Company, and they feel that they have gone just as far as they can in the offer made in my letter to Mr. Williamson dated February 3rd, copy of which is attached. The reasons for this were so fully expressed at the conference and in the correspondence that I have heretofore had with the commission that I feel it unnecessary to discuss the matter further in this letter.

We thank you very much for the very courteous conference afforded us in this matter.

Yours very truly,

W. B. BELL.

109 *Exhibit N to Maloney's affidavit.*

United States of America, before the Federal Trade Commission.

In the matter of Wholesale Tobacco & Cigar Dealers' Association of Philadelphia, Pennsylvania, its officers, directors and members; P. Lorillard Company, a corporation, et al. Answer.

P. Lorillard Company, one of the respondents herein, by H. H. Shelton and William B. Bell, its attorneys, answering the complaint herein:

First. Admits that A. B. Cunningham & Co., Dusel, Goodloe & Co., Inc., Franklin Tobacco Company, Peter F. Murphy Company, Charles K. Krull, S. Shepherd's Sons, T. H. Hart & Company, Yahn & McDonnell Company, M. Blumenthal, John Wagner & Sons, H. D. Narrigan & Company, Victor Fermani, Bennett Hollard, P. Hochman, M. J. Dalton Company, Brucker & Boghien, Inc., S. T. Banham & Brothers, and E. Cohen & Sons are concerns located in the city of Philadelphia, Pennsylvania; that F. Kuhn & Brothers, Baum & Neely, Inc., James S. Bechtold, Frank Blatt, Shipton & Payne Company, Duncan & Moorhead, and

Fred G. H. Woerner & Sons are concerns located in said city
110 of Philadelphia, Pennsylvania; and that F. Hartman & Son and Murphy Brothers are concerns located in the city of Camden, New Jersey;

That each of said concerns buys and sells tobacco products, and in the course of such business each one of said concerns, except Baum & Neely, Inc., has been and is a customer of respondent, P. Lorillard Company;

Second. Admits that American Tobacco Company is a corporation organized under the laws of the State of New Jersey, with its principal office in the city of Jersey City in said State and with factories in several of the United States; that at all the times mentioned in said complaint the American Tobacco Company was and still is engaged in the manufacture of cigarettes and other tobacco products and the sale thereof throughout the United States, in the course of which it causes a large percentage of its products when so sold to be transported from the points of manufacture to its customers at points in other States of the United States;

Third. Admits that P. Lorillard Company is a corporation organized under the laws of the State of New Jersey, with its principal office in the city of Jersey City in said State and with factories in several of the United States; that at all the times mentioned in said complaint P. Lorillard Company was and still is engaged in the manufacture of cigars, cigarettes, and other tobacco products and the sale thereof throughout the United States, in the course of which business it causes a large percentage of its products when so sold to be transported from the point of manufacture to the purchasers thereof at points in other States of the United States;

Fourth. Admits that both said American Tobacco Company and said P. Lorillard Company at all the times mentioned in said complaint were and still are in competition with each other and
111 with other individuals, partnerships and corporations similarly engaged in the manufacture and sale of tobacco products;

Fifth. Admits that P. Lorillard Company has from time to time sent to its customers a schedule of prices which is known as its price list, in which is quoted the prices at which, less certain well-known and specified discounts therefrom, the P. Lorillard Company is willing to sell its products to its customers.

Sixth. Denies each and every allegation of said complaint not hereinbefore expressly admitted insofar as said allegations relate to this respondent.

Seventh. Denies any knowledge or information sufficient to form a belief of the allegations of said complaint, not hereinbefore either expressly admitted or denied.

Eighth. And further separately objecting and answering the complaint herein, respondent alleges and submits that the complaint of the Federal Trade Commission is insufficient in law on the face

thereof, and that it does not state facts sufficient to entitle said commission to the relief therein prayed for.

Wherefore respondent demands judgment, dismissing the complaint.

P. LORILLARD COMPANY,
By DAVID H. BALL,
Vice President.

W. H. BELL,
511 Fifth Avenue, New York City.
H. H. SHELTON,
Munsey Building, Washington, D. C.,
Counsel.

112 *Affidavit of Wm. B. Leonard.*

In United States District Court.

STATE OF NEW YORK,
County of New York, ss:

WILLIAM B. LEONARD, being duly sworn, deposes and says:

I. I am the auditor of P. Lorillard Company, respondent in the above-entitled proceeding (hereinafter referred to as the "company") and I have been associated with the company and have acted in the capacity of its assistant auditor from 1912 to 1915 and auditor since 1915. In such capacities I have been in active charge of the mailing and filing departments of the company.

These departments employ nine (9) persons. In addition to these, each one of the departments of the company has one or more clerks, whose duties consist of attending to the filing of correspondence relating to those departments, viz, department of manufacture, leaf department, sales department.

II. The notice and demand of the Federal Trade Commission, attached to its petition herein and marked "Exhibit G," in which the commission demands access to and the right to examine documents and correspondence of the company, is very broad in its scope.

In subdivision 1 the commission demands the right to examine all letters and telegrams received by the company from all its jobber customers located at different points throughout the United States, and also copies of all letters and telegrams sent out by the company to each jobber, during the period from January 1st, 1921, to December 31st, 1921, inclusive. It repeats this demand in subdivision 3 as to all tobacco jobbers' and wholesale grocers' associations located at points throughout the United States. An examination of these letters and correspondence would be a very large and laborious under-
113 taking. The company receives approximately one thousand communications (including letters, telegrams, and remittances), every business day from all of its customers located at different points in the United States, and directs approximately fifteen

hundred communications (including letters, telegrams, and circular letters) to its customers every day.

III. In subdivision 2 of the notice and demand the commission demands access to and copies of all letters and telegrams received by the company from all of its sales force throughout the United States, as well as copies of all letters and telegrams sent to them by the company, for the period from January 1st, 1921, to December 31st, 1921. The company receives approximately six hundred (600) letters per week and daily reports from its nine hundred salesmen. This means at least four thousand (4,000) communications per week from its sales force. The company sends approximately six hundred (600) letters per week to its various salesmen, excluding, however, merely routine communications such as circular letters, salary checks, orders, etc.

IV. As to subdivision 5 of the notice and demand, there has been no correspondence between the company and the American Tobacco Company, Tobacco Products Corporation, Liggett & Myers Tobacco Company, Scotten-Dillon Company, Bloch Brothers, United Cigar Stores Company, American Snuff Company, and R. J. Reynolds Tobacco Company during this period, except certain correspondence relating to orders mistakenly sent by a jobber to one of the companies above named for products which are not manufactured by it. For example: The American Tobacco Company may receive an order for a certain number of "Beech Nut" cigarettes, which are manufactured by P. Lorillard Company. The order is then immediately transmitted to the latter, together with a letter of explanation. The company follows the same procedure whenever orders are
114 received for products which are manufactured by any one of the above-named companies. Correspondence of this nature is comparatively insignificant in volume and simply a matter of courtesy to correct mistakes occasionally made by customers.

V. As to subdivision 4, there are no agreements, contracts, understandings, or arrangements, either written, oral, or implied, existing between P. Lorillard Company and any tobacco jobbers or wholesale jobbers association located within the United States or any other place.

VI. The filing room of the company is located on the nineteenth floor of the building known as 119 West 40th Street, New York City. This room contains seventeen (17) cabinets, five (5) feet high and one and one-half (1½) feet wide, with four (4) drawers each, containing the general correspondence of the company. Nine (9) of these cabinets contain the general correspondence for the year 1921. The correspondence relating to each of the various departments of the company is kept in the departmental offices, under a separate filing system. The number and size of the cabinets used in each of the departments are as follows:

(a) Sales: In this department the company uses five (5) large cabinets four and one-half (4½) feet high by fifteen (15) inches in

width, each containing four (4) drawers. There are also ninety-six (96) small cabinets thirteen (13) inches high by four (4) inches in width.

(b) Leaf: In this department there are two hundred thirty-
115 five (235) small cabinets thirteen (13) inches high by four (4) inches in width, containing correspondence relating to that department. The correspondence for the year 1921 is contained in these files, as well as current correspondence and correspondence for several years previous to 1921. However, in order to accurately determine just what portion of this relates to the year 1921, it would be necessary to go over each file separately.

(c) Department of manufacture: In this department there are two (2) cabinets five (5) feet high by one and one-half (1½) feet wide, containing four (4) drawers each.

The above shows that the amount of correspondence relating to the various departments greatly exceeds the general correspondence of the company.

VII. The commission's demand, if granted by the court, would cause great inconvenience and large expense to the company during the period of investigation. It would require the entire time of at least three (3) persons familiar with those files for a period of at least a month in order thoroughly to investigate and examine the contents of the filing cabinets which are kept and maintained in the company's executive office. These files are in constant use by the various departments; and if the demand were granted, a great deal of confusion and delay would be caused thereby. During previous investigations by the Federal Trade Commission and the Department of Justice a large portion of the company's correspondence was inaccessible to the employees of the company during the period of such investigation. The amount of expense to the company is practically impossible to determine, but the effect of such investigation is to completely demoralize the force connected with any particular department.

116 Furthermore, the examination and subsequent publication of all or any part of the company's private affairs relating to its customers would seriously jeopardize the relations now existing between them and would cause a financial loss which it is impossible to estimate.

WILLIAM B. LEONARD.

Subscribed and sworn to before me this 1st day of September, 1922.

H. S. IVIE,
Notary Public.

New York Co. No. 17. New York register No. 3013.

117 *Affidavit of C. Frances Merz.*

United States District Court for the Southern District of New York.

[Title omitted.]

STATE OF NEW YORK,
County of New York, ss.

C. FRANCES MERZ, being duly sworn, deposes and says:

I am a clerk in the employ of P. Lorillard Company, the respondent in the above entitled case; that on the first day of September, 1922, at 5 o'clock in the afternoon, I served the annexed affidavits upon the Federal Trade Commission by causing 3 true copies thereof to be deposited in the United States mail at the branch post office known as the Times Square Station, Borough of Manhattan, in the city of New York, the same being one of the regular branch post offices of the New York general post office, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to

118 the said commission at their office, No. 105 West 40th St., Borough of Manhattan, city of New York, that being the address designated by said commission, and I registered the said package and obtained the receipt therefor, which is now in my possession.

C. FRANCES MERZ.

Subscribed and sworn to before me this 5th day of September, 1922.

H. S. IVIE,
Notary Public.

New York Co. No. 17. New York Registry No. 3013.

119 *Opinion.*

United States District Court, Southern District of New York.

THE FEDERAL TRADE COMMISSION, PETITIONER,
against
P. LORILLARD COMPANY, RESPONDENT.

FEDERAL TRADE COMMISSION, PETITIONER,
against
AMERICAN TOBACCO COMPAN, INC., RESPONDENT.

William Hayward, Esq., United States attorney, attorney for petitioner.

W. H. Fuller, Esq., chief counsel for Federal Trade Commission.

William D. Guthrie, Esq., William B. Bell, Esq., Bernard Hershkopf, Esq., of counsel for respondent P. Lorillard Company.

John Walsh, Esq., Junius Parker, Esq., Jonathan H. Holmes, Esq., of counsel for respondent American Tobacco Company, Inc.

These cases were argued together and will be considered in one opinion.

120 The petitioner in each of the above-named proceedings was granted an alternative writ of mandamus commanding the respondent to show cause why a peremptory writ should not issue directing that immediately it forthwith deliver into the possession of the Federal Trade Commission the accounts, books, records, documents, memoranda, papers, and correspondence of the respondent for inspection and examination and for the purpose of making copies thereof. The petition upon which the alternative writ was granted sets forth that on the 16th of September, 1921, a complaint was filed with the Federal Trade Commission against the respondent. The complaint alleged that the respondent in the conduct of its interstate commerce was indulging in practices which were in violation of the provisions of the act of Congress of September 26, 1914 (38 Stat. 717), in that the respondent was using certain methods of business practices resulting in unfair competition, in that it was regulating and fixing, or attempting to regulate and fix, the prices at which the commodities sold by it should be resold by those to whom it had sold them, and was cooperating, aiding, and abetting others to successfully formulate and carry out a scheme or combination pursuant to which the resale prices of respondent's commodities should be fixed and maintained by those to whom respondent had previously sold its products or commodities. Further, that the Senate of the Congress of the United States by a resolution directed the Federal Trade Commission to investigate the tobacco situation in the United States

121 as to the domestic and export trade, with particular reference as to the market price to producers of tobacco and the market price for manufacturing tobacco and the price of leaf tobacco exported, and to report to the Senate as soon as possible the result of such investigation. Petitioner then sets forth that at various times between September 29, 1921, and November 5, 1921, authorized agents of the petitioner, in its behalf, demanded of the respondent to produce and furnish to them at respondent's offices, certain specified documentary evidence or written data, correspondence, and other paper writings which were then and there in the possession, custody, and control of the respondent so that copies thereof or parts thereof might be made. And the respondent, complying with the demands and pursuant to its duty, under the provisions of the Federal trade act, did produce for inspection and examination of petitioner's agents, certain of the data commanded, but in violation of provisions of the Federal trade act, it refused to produce for inspection and examination "certain documentary evidence, records, correspondence, and writings herein specified which were then and there in respondent's possession, custody, and control, and it refused to permit copies thereof to be made by petitioner." And it sets forth that it is necessary in the prosecution of its duty that such inspection and examination be granted to the petition's agents and that it is hindered in the performance of its duty and in the exercise of its power by the re-

fusal of the respondent to grant such examination and inspection. Its prayer for relief is that "all papers and telegrams received by the American Tobacco Company (P. Lorillard Company) from all of its jobber customers located at different points throughout the United States, and also copies of all letters and telegrams sent
122 by the American Tobacco Company (P. Lorillard Company) to such jobbers during the period of January 1, 1921, to December 31, 1921, inclusive," be turned over for examination and inspection. Each respondent resists the application for a peremptory writ, contending that the Federal Trade Commission is asserting authority which it does not possess in seeking to make an unlimited and unrestricted inspection with the right to copy all of the correspondence with its jobber customers. That the Senate resolution directing the Federal Trade Commission to make the investigation referred to grants no authority for unlimited and unrestricted search with the right to copy the correspondence. It further contends that §§ 5, 6, and 9 of the Federal Trade Commission act give no such authority of unlimited and unrestricted search and examination, and it is said that any such construction or interpretation of the Federal Trade Commission act would be in contravention of the fourth amendment of the Constitution guaranteeing the right of the people to be secure in their papers and effects against unreasonable searches and seizures and that no warrant shall issue, but upon probable cause supported by oath or affirmation. Thus the question is presented whether Congress can delegate visitorial powers under the commerce clause of the Constitution over private corporations engaged in interstate commerce to the extent of granting unlimited and unrestricted examination and inspection with the right to copy.

By the act of Congress of September 26, 1914, the Federal Trade Commission was created a body corporate. Its purposes were defined by the statute creating it and its duties, and powers,
123 and administration are referred to in secs. 5, 6 and 9. It is provided by sec. 9 of the act that "for the purposes of this act, the commission or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against"; and sec. 6 of the act provides: "That the commission shall also have power—(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships." The Constitution provides (art. 1, sec. 8, cl. 3) that Congress shall have power to regulate commerce with foreign nations and among the several States.

Each respondent is conceded to be a private corporation engaged in selling tobacco and its products, and is engaged in interstate

and intrastate commerce. This investigation was commenced "for the purpose of ascertaining the facts relating to respondent's business." The business of each of the respondents is very extensive, its letters, papers, and other documents making it a business of thousands of letters per month. The affidavits submitted by the respondents set forth a mass of correspondence and other documentary evidence which, if the petitioner prevails in its alleged right to "full and complete access to any and all documentary evidence in the possession and control of the respondent," would, it is alleged,
124 handicap the respondent in its business and entail considerable expense and difficulties. Much of the correspondence relates to transactions bearing upon intrastate commerce only. As to such of the correspondence as bears upon intrastate commerce, the petitioner is not entitled to examination, inspection, or copying any part thereof. The commerce clause of the Constitution granting power to the Congress to legislate as to the commerce permits only of legislation which has to do with interstate commerce. The Federal trade act forbids unfair practices in reference to the commerce of an interstate character only. (Ward Baking Co. vs. Federal Trade Comm., 264 Fed. 330.) The commerce clause of the Constitution vested in the Congress "a full and complete power to regulate commerce among the several States, for the strong arm of the National Government may be put forth to brush away all obstacles to interstate commerce." (In re Debs, 158 U. S. 564.) And "Constitutional privileges do not change, but their operation extends to new matters as modes of business and the habits of life of the people vary with each succeeding generation. The power is the same, but it operates to-day upon modes of interstate commerce unknown to the fathers and will operate with equal force upon any new modes of such commerce which the future may develop." (Gibbons vs. Ogden, 22 U. S. 1.) The power of Congress to legislate embraces not only to regulate and control that which is wholly interstate, but also that which even though intrastate affects the free flow of interstate commerce. (Minn. Rate Cases, 230 U. S. 352.) To regulate is the power to enact legislation directly affecting interstate commerce. (United States vs. Adair, 152 Fed. 737.)
125 The Constitution having granted to the Congress plenary power to regulate or control commerce among the States, Congress may delegate such duties to investigate and learn conditions to a permanent administrative body.

The validity of the Interstate Commerce Commission act granting to that commission the power to investigate facts relating to interstate transportation was considered in Interstate Commerce Commission vs. Brimson (154 U. S. 447). It has been held that the visitorial power of the Federal Government provided for in the act, over private corporations, must be restricted to activities of an interstate commerce character. (Hale vs. Henkel, 201 U. S. 43; Interstate Commerce Comm. vs. Goodrich Co., 224 U. S. 194; United States

vs. Basic Products Co., 260 Fed. 472.) We must presume that the Congress did not intend by this legislation to invade the field reserved under the Constitution to the several States by interfering with transactions in intrastate commerce. "The statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." (United States vs. Jim Fuey Moy, 241 U. S. 394; see also United States vs. D. & H. Co., 213 U. S. 366.)

The resolution of the Senate provided that "the Federal Trade Commission be, and is hereby, directed to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference to the market price to producers for tobacco and the market price for manufactured tobacco and
126 the price of leaf tobacco exported, and report to the Senate as soon as possible the result of such investigation." This resolution has not the mandatory effect of statutory enactment with reference to the commerce clause of the Constitution, and the present application for the writ must rest by reason of the command of sec. 9 of the Federal Trade Commission act wherein jurisdiction is granted to the District Courts of the United States "to issue writs of mandamus commanding any person or corporation to comply with the provisions of this act or any order of the commission made in pursuance thereof." The resolution of the Senate does not come within the terms of the authority conferred by the statute in question. Under sec. 6 power is conferred upon the commission "upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust acts by any corporation," but the language of this statute makes it necessary for one of the Houses of Congress to adopt a resolution for a direction to investigate, and reporting such investigation must be for alleged violations of antitrust acts. The quotation from the resolution of the Senate fails to indicate that it is founded upon any violation or alleged violation of the antitrust law. It does not indicate that the Senate intended that any antitrust law violation should be investigated by the commission. If so, an apt expression to that effect could have been used. It can not, therefore, be concluded that it was intended in the language used to investigate any violations of the antitrust acts by any corporation. In any case the power of the Federal Trade Commission can not be broader than what Congress did or could delegate. The analogy of the cases arising under the powers of the
127 Interstate Commerce Commission with that of the Federal Trade Commission's powers, is pertinent. This was referred to in Beechnut Packing Co. vs. Federal Trade Comm. (264 Fed. 885). A comparison of the statutes particularly setting forth the procedure under the two acts shows the similarity. In each any person may be compelled to appear and depose and produce documentary evidence in the same manner as witnesses may be compelled

to appear and testify and produce documentary evidence before the commission. Both commissions are required to make findings and proceedings before them and the findings must be based upon the testimony given.

In the Harriman case (211 U. S. 417) Justice Holmes said:

"The commission * * * is given power to require the testimony of witnesses 'for the purpose of this act.' The argument for the commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it gives the commission; that one of the purposes is that the commission shall keep itself informed as to the manner and method in which the business of carriers is conducted, as required by section 12; that another is that it shall recommend additional legislation * * * and that for either of these general objects it may call on Congress to require anyone whom it may point out to attend and testify if he would avoid the penalties for contempt.

"We are of the opinion, on the contrary, that the purposes of the act for which the commission may exact evidence embraces only complaints for violation of the act, and investigations by the commission upon matters that might have been made the object of the complaint. As we have already implied, the main purpose of the act was to regulate the interstate commerce business of carriers, and the secondary purpose, that for which the commission was established, was to enforce the regulation enacted. These, in our opinion, are the purposes referred to; in other words, the power to require testimony is limited, as it usually is in English speaking countries, at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific branch of the law.

"If we felt more hesitation than we do, we still feel bound
128 to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits."

The Interstate Commerce Commission deals with quasi public corporations. But the phrase of the Federal Trade Commission act considered, in view of the language in the Harriman case, would indicate that the right to procure information in its investigations under the provisions of § 6, would not grant the unlimited search and inspection of correspondence with the right to copy the same in the absence of some specific complaint which would point out the materiality to that complaint of the particular correspondence and papers sought to be obtained.

Reading §§ 5, 6, and 9, I do not think that Congress intended at the time of the enactment of this law to go beyond the well-recognized principles of limitations with reference to searches and seizures guarded against by the fourth amendment of the Constitution. It is better to deduce the intention that information should only be extracted by the procedure long established in the courts in conformity with the constitutional guarantee against unlawful and unreasonable

searches and seizures and the right of people to be secure in their papers and effects therefrom. The fourth amendment provides:

"The right of the people to be secure in their * * * papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

This command of the Constitution, properly interpreted, is a prohibition against Congress granting powers to the commission
129 for unlimited searches and seizures of letters and documents. The act makes plain the duty of the commission to gather, compile, and publish for use in its proceedings what may be voluntarily offered or submitted in response to request or demand. It may also make investigation independently, but the exercise of visitorial power over private corporations must keep within the restrictions of the fourth amendment. "Neither branch of the legislative department, still less any merely administrative body established by the Congress, possesses or can be vested with a general power of making inquiry into the private affairs of a citizen." (Interstate Commerce Comm. vs. Brimson, 154 U. S. 478.)

As was said by Mr. Justice Brewer in In re Pacific Ry. Comm. (32 Fed. 241):

"There is no doubt that Congress may authorize a commission to obtain information upon any subject which in its judgment it may be important to possess * * * But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters."

It is the duty of the court to so construe the act as to save the statute from constitutional infirmity. (Knights Templar Indemnity Co. vs. Jarman, 187 U. S. 197; U. S. vs. D. & H. Co., 213 U. S. 407; Harriman vs. Interstate Commerce Comm., 211 U. S. 401.)

Section 6 (b) grants to the commission the right to require corporations coming within its jurisdiction to make reports concerning their affairs, and thus to furnish to the commission such information as it may require. And subdivision (a) of sec. 6 calls upon the corporations in question to report upon specific matters as provided in subdivision (b). If the corporations fail in reporting
130 or are false, the commission is entitled, upon properly showing the probable cause, to demand due disclosures and access to the inspection of any specific, necessary, and relevant papers, excluding such papers as may be privileged. In other words, there must appear to be some reasonable cause for a search, such as a definite complaint charging a specific wrong, and thus presenting an inquiry which would have reasonable and readily ascertainable limits. Such a construction of subdivisions (a) and (b) of § 6 would effectuate the intent of Congress, and the procedure can be kept within constitutional limits. (United States vs. L. & N. R. R., 236 U. S. 318; Veeder vs. United States, 252 Fed. 414.) Such a construction would seem to be in accord with the discussions in the Senate when this

legislation was enacted. (See 51 Congressional Records, part 13, 63rd Congress, second session, pp. 12747, 12800, 12806–11, 12918, 12927.) It was not intended to grant an unlimited power of inquisition or an unlimited right of access to books and papers of private parties not engaged in any public service or a search without basis of some facts tending to establish a charge of wrongdoing.

It is now well established that a corporation is entitled to invoke the guarantees of the fourth amendment against unreasonable searches and seizures in as full a measure as would a person or partnership. (Silverthorne Lumber Co. vs. United States, 251 U. S. 385; Coastwise Lumber Co. vs. United States, 259 Fed. 847.)

In the papers submitted on this application, there is no show of the existence of probable cause. The relief prayed for is in general terms and includes all papers and telegrams received by each
131 respondent from its jobber customers located in different points throughout the United States and copies of all letters and telegrams sent by each respondent to such jobbers during the period from January 1, 1921, to December 31, 1921, inclusive. Such general demands made in other warrants of law, such as a subpœna duces tecum, have been condemned as not giving a reasonably accurate description of the papers wanted, either by date, title, substance, or subject to which they relate. (Ex parte Brown, 72 Mo. 83; Carson vs. Hawley, 82 Minn. 204.)

In Bowd vs. United States (116 U. S. 616), the court quoted, with approval, Judge Camden's language in Entick v. Carrington and Three Other King's Messengers (19 Howell's State Trials, 1029) wherein he said:

"Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye can not by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society."

To grant the relief prayed for by the petitioner would be to permit of an unreasonable search and seizure of papers in violation of the fourth amendment. It was not the intention of Congress to grant such unlimited examination and inspection by the legislature in question nor, indeed, did Congress have authority to do so under the commerce clause of the Constitution. It would be un-
132 reasonable and unjust to accede to the demands of the petitioner and the application for the preemptory writ of man-

damus against the respondents American Tobacco Company and P. Lorillard Company is denied.

Dated October 3, 1922.

MANTON,
United States Judge.

133 *Notice of settlement.*

United States District Court, Southern District of New York.

[Title omitted.]

SIR: Please take notice than an order, of which the annexed is a copy, will be presented to Hon. Martin T. Manton, circuit judge, for settlement and signature, on the 16th day of October, 1922, at 10.30 o'clock in the forenoon at the office of the clerk of this court in the Federal Courts and Post Office Building, in the Borough of Manhattan, city of New York.

Dated, New York, October 4, 1922.

GUTHRIE, JEROME, RAND & KRESEL,
Attorneys for Respondent,
37 Wall Street, New York City.

To Hon. WILLIAM HAYWARD,
United States Attorney, Attorney for Petitioner,
Federal Courts and Post Office Building,
Borough of Manhattan, New York City.

134 *Order denying petition for mandamus.*

(Filed Oct. 19, 1922.)

At a stated term of the United States District Court held in and for the Southern District of New York in the Federal Courts and Post Office Building in the Borough of Manhattan, city and county of New York, on the 19th day of October, 1922.

Present: Hon. Martin T. Manton, circuit judge.

[Title omitted.]

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was

Ordered, adjudged, and decreed that the application of the petitioner for a peremptory writ of mandamus herein be, and the same is hereby, in all respects, denied upon the merits.

MANTON, *U. S. C. J.*

Service admitted.

U. S. District Court, S. D. of N. Y.

135 *Order to show cause.*

(Filed Dec. 16, 1922.)

United States District Court, Southern District of New York.

[Title omitted.]

Upon the annexed affidavit of Adrien F. Busick, verified the 14th day of December, 1922, and upon all of the proceedings had herein, it is

Ordered that the respondent show cause before me at my chambers, in room 431, Old Post Office Building, in the Borough of Manhattan, city of New York, at 10 o'clock a. m., Saturday, December 16, 1922, why the above entitled proceeding should not be transferred from the equity side to the law side of the court, without prejudice to the proceedings heretofore had herein; and it is

Further ordered that service upon Guthrie, Jerome, Rand & Kressel, Esqs., attorneys for respondent, on or before December 15, 1922, shall be deemed sufficient service of this order.

Dated New York, December 14, 1922.

MANTON,
Circuit Judge.

Service admitted.
U. S. District Court, S. D. of N. Y.

136 *Affidavit of Adrien F. Busick.*

United States District Court, Southern District of New York.

[Title omitted.]

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

ADRIEN F. BUSICK, being duly sworn, deposes and says that he is an attorney on the staff of the Federal Trade Commission and is associated with the United States attorney for the Southern District of New York in this proceeding.

This proceeding was commenced on the 13th day of June, 1922, by the filing of a petition for a writ of mandamus directed to the respondent; and an order granting an alternative writ of mandamus was issued on the same date.

An alternative writ was issued pursuant to an order on June 14, 1922.

Respondent filed its answer herein on the 5th day of July, 1922.

The cause was heard by the court on the petition, alternative writ, and answer on September 7, 1922.

On October 16, 1922, a final order was entered dismissing the petition in all respects on the merits.

Deponent further alleges that the petition herein prayed for the issuance of a writ of mandamus, pursuant to the provisions of the act of Congress entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved Sept. 26, 1914, to compel the respondent to afford the petitioner access to certain documents, papers, and correspondence.

137 Upon information and belief that such writ of mandamus should have issued out of the law side of the court, but through inadvertence and mistake the petition was docketed and all proceedings had herein on the equity side of the court, and the order was entered on that side of the court.

Deponent therefore respectfully requests that the court issue an order herein directing the respondent to show cause before it at a time to be fixed in the order why this proceeding should not be transferred from the equity side to the law side of the court, nunc pro tunc, as of June 13, 1922, the respondent's answer to stand as its return to the alternative writ, and the transfer to be otherwise without prejudice to any proceedings heretofore taken herein, and for such other and further relief as to the court may seem proper.

ADRIEN F. BUSICK.

Sworn to before me this 14th day of December, 1922.

[NOTARIAL SEAL.] CARL BRECKER,
Notary Public, N. Y. Co.

138 *Order transferring cause to law court.*

(Dec. 16, 1922.)

In the U. S. District Court for the Southern District of New York.

[Title omitted.]

This proceeding coming on to be heard on an order to show cause why the proceeding should not be transferred from the equity side to the law side of the court, it is

Ordered that the proceeding be, and the same is hereby, transferred from the equity side to the law side of the court, nunc pro tunc, as of June 13, 1922, the respondents answer and affidavits to stand as its return to the alternative writ, the transfer to be otherwise without prejudice to the proceedings heretofore had herein.

MANTON,
Circuit Judge.

December 16th, 1922.
Service admitted.
U. S. District Court, S. D. of N. Y.

139 *Assignment of errors.*

(Filed Jan. 2, 1923.)

In the District Court of the United States for the Southern District of New York.

[Title omitted.]

Now comes the Federal Trade Commission, the plaintiff in this action, and in connection with and as a part of its petition for a writ of error filed herein, makes the following assignments of errors which it avers were committed by the court in the rendition of the judgment against this plaintiff appearing upon the record herein; that is to say:

1. The court erred in holding and adjudging that the allegations in the plaintiff's petition did not entitle it to the issuance of a peremptory writ of mandamus as prayed for in the plaintiff's petition.

2. The court erred in holding and adjudging that respondent's return to the alternative writ of mandamus presented a valid or sufficient defense to the issuance of the peremptory writ as prayed for in the petition.

3. The court erred in not awarding the peremptory writ of mandamus.

4. The court erred in holding that the Federal Trade Commission act does not authorize the commission to examine, inspect, and copy correspondence relative to the transactions in intrastate commerce of corporations engaged also in interstate commerce, where the
140 transactions in intrastate commerce may throw light upon the conduct, organization, management, business, and practices of the corporation's interstate commerce and upon the question whether the corporation is engaged in the use of unfair methods of competition in interstate commerce.

5. The court erred in holding that Congress could not constitutionally authorize the commission to inspect and copy correspondence relative to the transactions in intrastate commerce of corporations engaged also in interstate commerce, where the transactions in intrastate commerce may throw light upon the conduct, organization, management, business, and practices of the corporation in interstate commerce, and upon the question whether the corporation is engaged in the use of unfair methods of competition in interstate commerce.

6. The court erred in holding that Congress could not constitutionally authorize the commission to inspect and copy correspondence relative to the transactions in intrastate commerce of corporations engaged also in interstate commerce, and the relation which such corporations bear to other corporations and to individuals, associations, and partnerships.

7. The court erred in holding that Congress could not constitutionally authorize the commission to inspect and copy correspondence relative to the transactions in intrastate commerce of corpora-

tions engaged also in interstate commerce, where the transactions in intrastate commerce show the relation of such corporation to
141 other corporations and to individuals, associations, and partnerships.

8. The court erred in holding that the commission's power to investigate the conduct, organization, management, business, and practices of corporations engaged in interstate commerce and in connection with such investigation to procure information under section 6 (a) and section 9 of the Federal Trade Commission act does not include the right to inspect and copy documents of corporations engaged in interstate commerce unless a definite complaint charging a specific violation of law has been issued and the materiality to that complaint of the particular correspondence and papers sought to be obtained made to appear.

9. The court erred in holding that Congress can not constitutionally empower the commission to investigate the conduct, organization, management, business, and practices of corporations engaged in interstate commerce, and in connection with such investigation confer also the right to inspect and copy documents of corporations engaged in interstate commerce, unless a definite complaint charging a specific violation of law has been issued and the materiality to that complaint of the particular correspondence and papers sought to be obtained made to appear.

10. The court erred in holding that section 6 (a) of the Federal Trade Commission act authorizes the commission to gather and compile only such information respecting the conduct, organization, management, business, and practices of corporations engaged
142 in interstate commerce as may be voluntarily given.

11. The court erred in holding that Congress can not constitutionally empower the Federal Trade Commission to gather and compile information respecting the conduct, organization, management, business, and practices of corporations engaged in interstate commerce and confer upon said commission the right to have access to, for purposes of inspection, and to copy books, documents, papers, and correspondence respecting the interstate commerce of corporations engaged in such commerce.

12. The court erred in not holding that section 9 of the Federal Trade Commission confers authority upon the commission to inspect the books, documents, papers, and correspondence, and to make copies thereof, of any corporation engaged in interstate commerce whose conduct, organization, management, business, and practices are being investigated by the commission under authority of section 6 (a).

13. The court erred in holding that Congress can not constitutionally confer upon the commission authority to demand access to, for the purpose of inspection, books, documents, papers, and correspondence respecting the interstate commerce of corporations engaged in such commerce for the purpose of making reports to Congress and of publishing facts respecting the business and prac-

tices of such corporations within the limits laid down in section 6, paragraphs (a), (b), and (f), of the Federal Trade Commission act.

14. The court erred in holding that section 6 (a) and section 9 of the Federal Trade Commission act do not authorize the commission to require access to and the right to inspect books, documents, papers, and correspondence relating to the interstate commerce of a corporation engaged in such commerce and to make copies thereof unless the commission has issued a complaint charging a specific violation of law.

143

15. The court erred in not holding that the commission is authorized, under section 6(a) and section 9 of the Federal Trade Commission act, to require access to, and the right to copy, documents, papers, and correspondence of the defendant corporation for the purpose of determining whether there is reason to believe that an unfair method of competition is being used by it in violation of section 5 of the Federal Trade Commission act, where a charge has been lodged with the commission that the defendant is using a method of competition which has been held to be a violation of the said section 5.

16. The court erred in not holding that Congress can constitutionally authorize the commission to require access to, and the right to copy, documents, papers, and correspondence of the defendant corporation for the purpose of determining whether there is reason to believe that an unfair method of competition is being used by it in violation of section 5 of the Federal Trade Commission act, where a charge has been lodged with the commission that the defendant is using a method of competition which has been held to be a violation of said section 5.

17. The court erred in not holding that the commission is authorized by section 6(a) and section 9 of the Federal Trade Commission act to inspect, with the right to copy, specified books, records, papers, or correspondence relating to the interstate commerce of corporations engaged in such commerce, for the purpose of ascertaining, on its own motion, whether there is reason to believe that an unfair method of competition is being used in violation of section 5 of the Federal Trade Commission act.

144

18. The court erred in holding that the commission must establish, from sources other than the books, documents, papers, and correspondence of the defendant corporation, that there is probable cause to believe that it is violating some law which the commission is charged with enforcing before any access to the corporate books, documents, papers, and correspondence can be had.

19. The court erred in holding that the papers submitted on the application for a writ of mandamus did not disclose probable cause to believe that the defendant corporation was employing, in combination with jobbers of products sold by it, cooperative means of fixing and maintaining prices at which the products made and sold by it should be resold by jobbers.

20. The court erred in holding that Congress cannot constitutionally confer upon the commission the power to demand access to, and the right to inspect, the books, documents, papers, and correspondence relating to the interstate commerce of corporations engaged in such commerce, in connection with the making of investigations respecting the conduct, organization, management, business, and practices of corporations engaged in interstate commerce, for the purpose of reporting the facts to Congress, and of making public
145 such parts thereof as the commission may deem to the public interest.

21. The court erred in holding that the Federal Trade Commission act does not confer upon the commission authority to require access to the limited number of documents, papers, and correspondence of the respondent specified in the prayer of the petition, with the right to copy such parts thereof as may be deemed desirable, for the purpose of making reports to Congress respecting conditions in interstate commerce.

22. The court erred in holding that Congress could not constitutionally confer upon the commission authority to require access to the limited number of documents, papers, and correspondence of the respondent specified in the prayer of the petition, with the right to copy such parts thereof as may be deemed desirable, for the purpose of making reports to Congress respecting conditions in interstate commerce.

23. The court erred in holding that the Federal Trade Commission act does not confer upon the commission authority to require access to the limited number of documents, papers, and correspondence of the respondent specified in the prayer of the petition, with the right to copy such parts thereof as may be desired, for the purpose of ascertaining whether there is reason to believe that a charge lodged with the commission that the respondent is engaging in the use of unfair methods of competition, in violation of section 5 of the Federal Trade Commission act, is well founded.

24. The court erred in holding that Congress could not con-
146 stitutionally confer upon the Federal Trade Commission the power to require access to the limited number of documents, papers, and correspondence of the respondent specified in the prayer of the petition, with the right to copy such parts thereof as may be desired, for the purpose of ascertaining whether there is reason to believe that a charge lodged with the commission that the respondent is engaging in the use of unfair methods of competition, in violation of section 5 of the Trade Commission act, is well founded.

25. The court erred in holding that the Federal Trade Commission act does not confer upon the commission authority to require access to the limited number of documents, papers, and correspondence of the respondent specified in the prayer of the petition, with the right to copy such parts thereof as may be desired, for the purpose of proving the charges in a formal complaint issued by the commission

charging the respondent with the use of unfair methods of competition in violation of section 5 of the Trade Commission Act.

26. The court erred in holding that Congress could not constitutionally confer upon the commission authority to require access to the limited number of documents, papers, and correspondence of the respondent specified in the prayer of the petition, with the right to copy such parts thereof as may be desired, for the purpose of proving the charges in a formal complaint issued by the commission charging the respondent with the use of unfair methods of competition in violation of section 5 of the Trade Commission act.

146 27. The court erred in holding that a corporation engaged in interstate commerce is entitled to the protection of the fourth amendment to the Constitution of the United States in as full a measure as is a natural person.

28. The court erred in holding that the commission was asserting a right under the statute to an "unlimited search and inspection" of the books, documents, papers, and correspondence of the defendant. The rights of access and inspection asserted by the commission is to be measured by the prayer of the petition, which was limited to correspondence with a specified class of customers and associations of such customers, correspondence with its sales forces, agreements or contracts with associations of tobacco jobbers and wholesale grocers, correspondence and contracts or agreements with approximately eight competitors, all for a period of approximately one year.

29. The court erred in holding that the commission's notice and demand, limited as it was and made under authority of an act of Congress, passed in the exercise of the power to regulate interstate commerce, amounted to an unreasonable search and seizure of the papers and effects of the defendant corporation, with the prohibition of the fourth amendment to the Constitution of the United States.

30. The court erred in holding: "It is now well established that a corporation is entitled to invoke the guarantees of the fourth amendment against unreasonable searches and seizures in as full a measure as would a person or partnership."

31. The court erred in holding that a demand for access to, for the purpose of inspection and copying of books, documents, papers, and correspondence relating to the interstate commerce of a corporation engaged in such commerce, made under the authority of

148 an act of Congress in the exercise of the visitorial power of Congress over the interstate commerce of corporations engaged in such commerce, amounts to an unreasonable search and seizure within the prohibition of the fourth amendment to the Constitution of the United States.

32. The court erred in not holding that Congress, in exercising its power under the Constitution to regulate commerce, had the right to examine the books and papers and correspondence of any corporation engaged in interstate commerce, and that the only limitation upon this right is that such demand and investigation must be

reasonable, so as to not interfere unnecessarily with the conduct of the business of the corporation being investigated.

33. The court erred in failing to distinguish between those cases where the courts have invoked on behalf of individuals the fourth and fifth amendments in regard to the examination of the private effects of the individual, and also cases where it had been invoked in favor of corporations in case of subpœna duces tecum, the enforcement of which would denude the office of the corporation being investigated and prevent it from carrying on its business for an indefinite time; and the case at bar, where, under the very provisions of the Federal Trade Commission act, no corporation can be investigated that is not engaged in interstate commerce; and, second, that no interruption is caused in the conduct of the business of the
149 corporation, as no books are sought to be taken under the writ desired in this case from the office or possession of the corporation.

34. The court also erred in not holding that the fourth and fifth amendments did not apply to a corporation engaged in interstate commerce that was being investigated by an agency created by Congress for the purpose of ascertaining the manner in which such corporation is conducting its interstate business, unless such investigation is conducted in an unreasonable way so as to wantonly and unnecessarily interfere with the conduct and continuation of the business of such corporation during such investigation.

HARRY M. DAUGHERTY,
Attorney General of the United States.
WILLIAM HAYWARD,
U. S. Attorney for the Southern District of New York.

Service admitted.
U. S. District Court S. D. of N. Y.

150 *Consent to amendment of record.*

In United States District Court.

[Title omitted.]

It is hereby consented that a prayer for reversal, of which the attached is a copy, may be added to the record on appeal to the Supreme Court of the above-entitled case as if same had been a part of the assignment of errors.

New York, January 23rd, 1923.

GUTHRIE, JEROME, RAND & KRESEL,
Attorneys for Defendant in Error.

151 *Prayer for reversal.*

In United States District Court.

[Title omitted.]

And now comes the Federal Trade Commission, the plaintiff in error, by the Attorney General of the United States, and prays for a

reversal of the judgment of the United States District Court for the Southern District of New York in the proceeding brought by the Attorney General of the United States, at the request, and in the name, of the Federal Trade Commission, which judgment was entered in the office of the clerk of said United States District Court for the Southern District of New York on or about the 16th day of October, 1922.

(Sgd.) HARRY M. DAUGHERTY,
Attorney General of the United States.
(Sgd.) WILLIAM HAYWARD,
U. S. District Attorney for the Southern District of New York.

JANUARY 23, 1923.

152 *Petition for writ of error.*

(Filed Jan. 2, 1923.)

The District Court of the United States for the Southern District of New York.

[Title omitted.]

And now comes the Federal Trade Commission, plaintiff herein, and says:

That on or about the 16th day of October, 1922, the District Court entered a judgment herein in favor of the defendant and against this plaintiff in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

HARRY M. DAUGHERTY,
Attorney General of the United States.
WILLIAM HAYWARD,
United States Attorney for the Southern District of New York.

Service admitted.
U. S. District Court, S. D. of N. Y.

153 *Citation and service.*

(Filed Jan. 2, 1923.)

UNITED STATES OF AMERICA, *ss:*

The honorable John C. Knox, one of the United States district judges for the Southern District of New York, in the Second Circuit, to P. Lorillard Company, Inc., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days

from the date hereof, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein the Federal Trade Commission is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this 3d day of January, in the year of our Lord one thousand nine hundred and twenty-three and of the independence of the United States the one hundred and forty-seventh.

[SEAL.] JNO. C. KNOX,
United States District Judge
for the Southern District of New York,
in the Second Circuit.

154 [File endorsement omitted.]
Service of within citation admitted.
January 2, 1923.
GUTHRIE, JEROME, RAND & KRESEL,
Attys. for def.

155 *Stipulation as to transcript.*

United States District Court, Southern District of New York.

[Title omitted.]

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated Jan. 5, 1923.

WM. HAYWARD,
U. S. Attorney,
Attorney for plff. in error.
GUTHRIE, JEROME, RAND & KRESEL,
Attorneys for def. in error.

[Endorsed on cover: File No. 29366, S. New York, D. C. U. S. Term No. 816. Federal Trade Commission, plaintiff in error, vs. P. Lorillard Company, Inc. Filed January 27th, 1923. File No. 29366.]

WASHINGTON : GOVERNMENT PRINTING OFFICE : 192

Office Supreme Court, U. S.
FILED
MAR 3 1924
WM. R. STANSBURY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1923, No. 207.

FEDERAL TRADE COMMISSION,

Plaintiff-in-error,

against

P. LORILLARD COMPANY, INC.,

Defendant-in-error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE DEFENDANT-IN-ERROR.

WILLIAM D. GUTHRIE,
WILLIAM B. BELL,
WILLIAM R. PERKINS,
BERNARD HERSHKOPF,
Of counsel for defendant-in-error.

TABLE OF CONTENTS.

	PAGE
Preliminary statement	1
Statement of facts	9
I. Senate Resolution No. 129 did not warrant granting any relief	27
II. Congress did not intend to vest in the Commission unlimited and unrestricted power of inquisition irrespective of any pending complaint or the relevancy of evidence	30
(1) The congressional debates	31
(2) The authorities	33
(3) The provisions of the Federal Trade Commission Act	38
(4) The judicial power over subpoenas duces tecum compared with the Commission's claim to larger powers	45
(5) The unlimited character of the Commission's demand	50
(6) The Commission's attempted misuse of the writ of mandamus	51
III. The constitutional rights of the defendant under the Fourth Amendment	53
(1) The want of probable cause and due oath or affirmation	56
(2) The Commission's new contentions on this score	62
(a) The alleged anonymous complaint	63
(b) The so-called Philadelphia complaint	66
(c) The Commission's report to the Senate	68
(3) The powers of the grand jury and the Commission distinguished	69
IV. The Commission has no power to compel the production of the defendant's documentary evidence relating to intrastate commerce	70
V. Mandamus is not the proper remedy for compelling the production of the documentary evidence sought by the Commission	78
VI. The court below was justified in the exercise of its sound discretion in denying the remedy of mandamus and leaving the Commission to secure any proper and relevant documentary evidence by means of the ordinary procedure of a subpoena duces tecum in a proper proceeding	87
Conclusion	89
Order of Federal Trade Commission dismissing Philadelphia complaint	90

List of Authorities.

PAGE

American Eng. Co. v. Metropolitan By-Products Co., 280 Fed. 677, certiorari denied, 254 U. S. 640 and 257 U. S. 653 79
Arant v. Lane, 249 U. S. 367 88
Arkansas Gas Co. v. Railroad Commission, 261 U. S. 379 ..... 41, 74
Atherton Mills v. Johnston, 259 U. S. 13 67

Blair v. United States, 250 U. S. 273 69
Boyd v. United States, 116 U. S. 616 54
Bratton v. Chandler, 260 U. S. 110 74
Brownlow v. Schwartz, 261 U. S. 216 67

Carson v. Hawley, 82 Minn. 204 ..... 46, 48, 79
Charge to Grand Jury, 2 Sawyer 667 70
Coastwise Lumber & Supply Co. v. United States, 259 Fed. 847 55
Coe v. Errol, 116 U. S. 517 70
Crescent Oil Co. v. Mississippi, 257 U. S. 128 70

Del. Lack. & West. R. R. Co. v. Yurkonis, 238 U. S. 439 70

Ellis v. Interstate Commerce Commission, 237 U. S. 434 ..... 19, 33, 44
Employers' Liability Cases, 207 U. S. 463 74
Essgee Co. v. United States, 262 U. S. 151 ..... 55, 69, 80
Ex parte Brown, 72 Mo. 83 ..... 46, 47, 79
Ex parte Riddle, 255 U. S. 450 79
Ex parte Uppercu, 239 U. S. 435 79

Federal Trade Com. v. Baltimore Grain Co., 284 Fed. 886 ..... 20, 28, 33, 37
Federal Trade Com. v. Claire Furnace Co., 285 Fed. 936, 20, 33, 38, 43, 72, 75, 76
Federal Trade Com. v. Curtis Publishing Co., 260 U. S. 568 59
Federal Trade Com. v. P. Lorillard Co., 283 Fed. 999 ..... 1, 36, 43, 49

Gouled v. United States, 255 U. S. 298 53

Hale v. Henkel, 201 U. S. 43 ..... 45, 46, 54, 69, 72, 80, 83, 85
Hammer v. Dagenhart, 247 U. S. 251 ..... 70, 75
Harriman v. Interstate Commerce Commission, 211 U. S. 407, 33, 34, 35, 36, 39, 42
Heine v. Levee Commissions, 19 Wall. 655 28
Heisler v. Thomas Colliery Co., 260 U. S. 245 70
Heitmuller v. Stokes, 256 U. S. 359 67
Hendricks v. United States, 223 U. S. 178 69
Hoppe v. W. R. Ostrander & Co., 183 Fed. 786 ..... 46, 79
Hyde v. Shine, 199 U. S. 62 89

In re Higdon, 269 Fed. 150 28
In re Pacific Railway Commission, 32 Fed. 241 ..... 33, 40
In re Pennsylvania Co., 137 U. S. 451 79
In re Tri-state Coal & Coke Co., 253 Fed. 605 55
Interstate Commerce Commission v. Baird, 194 U. S. 25 34
Interstate Commerce Commission v. Brimson, 154 U. S. 447 ..... 33, 40, 52
Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194 ..... 72, 77, 78

	PAGE
Kendall v. Stokes, 3 How. 87	79
Kendall v. United States, 12 Pet. 524	79
Kidd v. Pearson, 128 U. S. 1	70
Kilbourn v. Thompson, 103 U. S. 168	33
Knapp v. Lake Shore Ry. Co., 197 U. S. 536	28
Matter of Barnes, 204 N. Y. 108	33
Matter of Foster, 139 N. Y. App. Div. 769	33
Matter of Steinway, 159 N. Y. 250	9
Maynard Coal Co. v. Federal Trade Com., 48 Wash. Law Rep. 278	19, 71, 72, 75
McCarthy v. Arndstein, 262 U. S. 355	62
Memen Co. v. Federal Trade Commission, 288 Fed. 774, certiorari denied, 262 U. S. 759	78
Missouri Pacific Ry. v. Fitzgerald, 160 U. S. 556	62
Mobile Gas Co. v. Patterson, 288 Fed. 884	25, 46, 50, 61, 79
Morrill v. Jones, 106 U. S. 466	62
People ex rel. Franklin v. Fetherston, 168 N. Y. App. Div. 416	9
Railway Co. v. McCarthy, 96 U. S. 258	24
Savin, Petitioner, 131 U. S. 267	70
Silverthorne Lumber Co. v. United States, 251 U. S. 385	54
Smith v. Bourbon County, 127 U. S. 105	28
Smith v. Interstate Com. Com., 245 U. S. 33	22
Stafford v. Wallace, 258 U. S. 495	76
Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252	77
Texas v. E. Texas R. R. Co., 258 U. S. 204	41
Turner v. Fisher, 222 U. S. 204	87
United States v. Alaska S. S. Co., 253 U. S. 113	67
United States v. Basic Products Co., 260 Fed. 472	19, 33, 36, 71, 72, 75
United States v. Baumert, 179 Fed. 735	58, 62
United States v. Delaware & Hudson Co., 213 U. S. 366	41, 74
United States v. Freight Association, 166 U. S. 290	78
United States v. Harnich, 289 Fed. 256	58, 62
United States v. Jin Fuey Moy, 241 U. S. 394	74
United States v. Kaplan, 286 Fed. 963	58
United States v. Kelih, 272 Fed. 484	58
United States v. Kelly, 277 Fed. 485	58
United States v. Louisville & Nashville R. R. Co., 236 U. S. 318, affirming 212 Fed. 486	13, 28, 33, 35, 42
United States v. Louisville & Nashville R. R. Co., 212 Fed. 486, affirmed, 236 U. S. 318	28, 88
United States v. McHie, 194 Fed. 894	55
United States v. McQuade, U. S. D. C. E. D. N. Y., Thomas, D. J. (not reported)	55
United States v. Michalski, 265 Fed. 839	62
United States v. Nashville, C. & St. L. Ry. Co., 217 Fed. 254	9, 28, 88
United States v. Pitotto, 267 Fed. 603	58
United States v. Premises in Butte, Mont., 246 Fed. 185	58
United States v. Providence Tribune Co., 241 Fed. 524	70
United States v. Ray & Schultz, 275 Fed. 1004	58
United States ex rel. Russell v. District of Columbia, 271 Fed. 370	9

PAGE

United States v. Rykowski, 267 Fed. 866 58
United States v. Terminal R. Assn., 154 Fed. 268 ..... 46, 49, 79
United States v. Walter, 263 U. S. 15 83

Veeder v. United States, 252 Fed. 414, certiorari denied 246 U. S. 675 ..... 57, 58, 60, 61

Ward v. Love County, 253 U. S. 17 62
Ward Baking Co. v. Federal Trade Commission, 264 Fed. 330 71
Weeks v. United States, 232 U. S. 383 54
Wheeler v. United States, 226 U. S. 478 69
Wilson v. United States, 221 U. S. 361 ..... 46, 69, 80, 85
Winslow v. Federal Trade Commission, 277 Fed. 206, certiorari denied, 258 U. S. 618 71

Supreme Court of the United States,

OCTOBER TERM, 1923, No. 207.

FEDERAL TRADE COMMISSION,

Plaintiff-in-error,

against

P. LORILLARD COMPANY, INC.,

Defendant-in-error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE DEFENDANT-IN-ERROR.

The above entitled writ of error presents for review an order made by Circuit Judge Manton in the District Court of the United States for the Southern District of New York denying to the Federal Trade Commission a peremptory writ of mandamus to compel the defendant corporation to submit certain documentary evidence for the inspection of an agent of the Commission (Record, p. 62*). The opinion of the court below (pp. 54-62) is reported in 283 Fed. 999.

---

* The page references are to the printed record unless otherwise stated.

The proceeding came before the District Court upon a petition by the Federal Trade Commission under section 9 of the Federal Trade Commission Act (c. 311, 38 Stat. 717, approved September 26, 1914) praying (pp. 10-2) "that an alternative writ of mandamus forthwith issue commanding the respondent [i. e., the defendant-in-error], unless the accounts, books, records, documents, memoranda, contracts, papers and correspondence of the respondent are immediately submitted to the duly authorized agent or examiner of the Federal Trade Commission for inspection and examination and for the purpose of making copies thereof, that the respondent show cause . . . why a peremptory writ of mandamus should not issue directed to the said respondent commanding the respondent to forthwith deliver into the possession of the Federal Trade Commission, or its duly authorized agent, at the office of the said corporation, No. 119 West 40th Street, in the city of New York, during the usual business hours of any business day and at such times as the duly authorized agent shall request, for examination and inspection, and for the purpose of copying the same, or such portions thereof as may be desired, the following:

> "All letters and telegrams received by the P. Lorillard Company, Incorporated, from all of its jobber customers located at different points throughout the United States, and also copies of all letters and telegrams sent by said P. Lorillard Company, Incorporated, to such jobbers during the period January 1, 1921, to December 31, 1921, inclusive.
>
> "All letters and telegrams received by the P. Lorillard Company, Incorporated, from all of its sales force or salesmen located in different parts

of the United States and also copies of all letters and telegrams sent by said P. Lorillard Company, Incorporated, to said sales force or salesmen, and also all reports and memoranda made by said sales force or salesmen to the said P. Lorillard Company, Incorporated, during the period January 1, 1921, to December 31, 1921, inclusive.

"All letters and telegrams received by the P. Lorillard Company, Incorporated, from all tobacco jobbers' or wholesale grocers' associations located at different points throughout the United States, and also copies of all letters and telegrams sent by said P. Lorillard Company, Incorporated, to said tobacco jobbers' or wholesale grocers' associations during the period January 1, 1921, to December 31, 1921, inclusive.

"Any agreements or contracts or arrangements evidenced by any papers, documents or correspondence between P. Lorillard Company, Incorporated, and tobacco jobbers' or wholesale grocers' associations located in different parts of the United States, during the period January 1, 1921, to December 31, 1921, inclusive.

"All letters and telegrams received by the P. Lorillard Company, Incorporated, during the period January 1, 1921, to December 31, 1921, inclusive, from the following named corporations, located at different points throughout the United States: The American Tobacco Company, Tobacco Products Corporation, Liggett & Myers Tobacco Company, Scotten-Dillon Company, Bloch Brothers Company, United Cigar Stores Company, American Snuff Company and R. J. Reynolds Tobacco Company, and also copies of all letters and telegrams sent said above named corporations during the above named period by the P. Lorillard Company, Incorporated.

"All agreements or contracts or understandings evidenced by any papers, documents or correspondence between the P. Lorillard Company, Incorporated, and The American Tobacco Company,

> Tobacco Products Corporation, Liggett & Myers Tobacco Company, Scotten-Dillon Company, Bloch Brothers Company, United Cigar Stores Company, American Snuff Company and R. J. Reynolds Tobacco Company, during the period January 1, 1921, to December 31, 1921, inclusive, all of the above named concerns being corporations located at different points throughout the United States."

An alternative writ commanding the defendant company to show cause why a peremptory writ should not issue was granted *ex parte* (p. 4), and, in accordance therewith, the defendant corporation filed objections and an answer to the petition and submitted affidavits in support of its allegations (pp. 35-7, 38-54). This answer duly denied several of the material allegations of the petition, such as (1) that a complaint of violation of section 5 of the act of Congress had been filed in September, 1921, and (2) that all the documentary evidence in question related to the defendant company's business in interstate commerce (pp. 34-35). The case was thereafter heard upon the pleadings and affidavits upon the motion of the Commission.

The controversy arose out of the claim of the Federal Trade Commission, asserted on its behalf by its chairman, that the act of Congress of September 26, 1914, conferred upon it "an *unlimited* right of access to the books and records of a corporation under investigation," as well as the right to make copies therefrom (p. 17), and that it was entitled to have a full and unrestricted examination of *all* books, records and correspondence of any such corporation (p. 47), notwithstand-

ing the absence of any definite complaint of violation of law by the defendant corporation, and notwithstanding the fact that the Commission, so far as appeared, did not have, or even profess to have, any reason to believe that the defendant corporation had been or was using any unfair method of competition in commerce, or had been or was violating the anti-trust acts or any other act of Congress, and the further fact that there was no evidence that it appeared to the Commission that a proceeding by it in respect of any alleged unfair method of competition by the defendant would be to the interest of the public. All that was disclosed was (1) that the United States Senate on August 9, 1921, had passed a resolution directing the Commission to investigate the tobacco situation in the United States with particular reference to market price to producers for manufactured tobacco and leaf tobacco exported, (2) that some kind of an application for the issuance of a complaint had been docketed for investigation on September 16, 1921, the basis of which was not disclosed in any particular, and that the defendant company was charged therein "with engaging in an unfair method of competition in violation of section 5 of the Federal Trade Commission Act" (p. 13), and (3) that on the date of the verification of the petition for a mandamus, *i. e.*, May 31, 1922, the Commission had authorized and issued a definite complaint against the Wholesale Tobacco & Cigar Dealers Association of Philadelphia and others, including the present defendant, charging them with "using unfair methods of competition in interstate commerce in violation

of the provisions of section 5 of said act" (pp. 24-30). The last-mentioned complaint against the defendant company has, however, since the decision below been fully heard by the Commission and dismissed, as will appear by reference to a copy of the order of the Commission appended to this brief.

The resolution of the Senate, above referred to, was adopted August 9, 1921 (S. Res. 129). A copy is annexed to the petition for the writ of mandamus as Exhibit A (p. 12) and reads as follows:

> "Resolved, That the Federal Trade Commission be, and is hereby, directed to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to market price to producers for tobacco and the market price for manufactured tobacco and the price of leaf tobacco exported, and report to the Senate as soon as possible the result of such investigation."

The defendant corporation upon receipt of a copy of the original resolution of investigation adopted by the Commission on October 14, 1921, and of a notice and demand in pursuance thereof dated October 17, 1921 (pp. 13, 15-6), requested that it be advised of the name of the applicant for the alleged complaint and the facts with respect thereto, as shown by the files of the Commission (p. 46), but such information was denied, the chairman of the Commission stating, among other things (see letter dated October 26, 1921, Exh. E to the petition for mandamus, pp. 16-17), as follows:

> "It is noted that you desire us to inform you as to the name of the applicant who has made complaint against your company. The investiga-

tion which is the subject matter of this correspondence was instituted by the Commission by instruction of the United States Senate pursuant to Senate Resolution number 129. In connection therewith and as a separate part thereof the Commission is including in this investigation an inquiry with reference to the possible existence of practices in violation of section 5 of the Trade Commission Act.

"Under the rules of the Commission disclosure is not made as to the name of a possible applicant, nor, in fact, whether the Commission is proceeding upon the application of a private party or upon its own motion . . . It is impossible, therefore, to comply with your request for the name of the private party applicant . . .

"We call your attention to the fact that the preliminary investigation now being made is directly pursuant to the instructions of a resolution by the United States Senate; that the actions of the Commission under section 5 are supplementary thereto, and that the Commission is proceeding on this preliminary examination under the first power conferred by the first paragraph of section 9 referred to above. In view of these conditions the Commission insists that its representatives be given full and complete access to any and all documentary evidence in the possession or control of the P. Lorillard Company."

Subsequent to the notice and demand of October 17, 1921, above mentioned, a revised notice and demand was served under date of March 3, 1922 (pp. 21-23), demanding the right of access to, delivery of possession, and the right to make copies of all the documents, papers and correspondence of the defendant corporation specifically set forth in the paragraphs above quoted. The defendant corporation declined to allow any such unlimited and unrestricted examination of its documents (pp. 18-20),

and the Commission thereupon applied for a writ of mandamus under the alleged authority of paragraph fourth of section 9 of the Federal Trade Commission Act to compel the defendant company to permit such access, delivery of possession and right to make copies. This application was opposed by the defendant corporation in the court below upon the following grounds:

1. That the Senate Resolution did not come within the authority vested by the act of Congress in the Federal Trade Commission or warrant granting any relief.

2. That it was not the intent of Congress to vest in the Commission unlimited and unrestricted power of investigation of documentary evidence irrespective of any definite and pending complaint of violation of law or relevancy to such a complaint.

3. That any grant of unlimited and unrestricted right of access, possession and inspection as claimed by the Commission as to corporations, would constitute an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States.

4. That in any event the Commission had no power to compel the production of and no right to the possession of documentary evidence relating to the intrastate business of the defendant corporation.

5. That the production of documentary evidence and delivery of possession for the purpose of inspection, examination and copying by an agent of the Commission ought not to be ordered or compelled by writ of mandamus.

6. That under the circumstances the court should, in the exercise of its discretion, deny the remedy of mandamus and leave the Commission to secure the production of any proper and relevant documentary evidence by means of the ordinary procedure of a subpoena duces tecum.

As the application for the peremptory writ of mandamus, upon the Commission's own motion, was disposed of in the court below upon the petition, answer and affidavits, the allegations of the petition duly denied must be disregarded, and any other facts, within the well-settled rule, are to be taken as alleged in the defendant's answer and affidavits. *United States* v. *Nashville, C. & St. L. Ry. Co.*, 217 Fed. 254, 258-9; *United States ex rel. Russell* v. *District of Columbia*, 271 Fed. 370, 371; *Matter of Steinway*, 159 N. Y. 250, 254; *People ex rel. Franklin* v. *Fetherston*, 168 N. Y. App. Div. 416, 417.

STATEMENT OF FACTS.

The defendant-in-error, P. Lorillard Company, is a private corporation organized under the laws of the State of New Jersey and engaged in the private business of making and selling tobacco and tobacco products (p. 5). Whilst the petition in effect alleges that all of the defendant company's business is in interstate commerce, the answer (p. 34) and affidavits (pp. 39, 44) affirmatively show that this is not the fact. It was established that nearly one-third of its business was wholly intrastate (pp. 39, 57), and that more than one-half of the

correspondence now sought by the Commission, related to its manufacturing and intrastate business (p. 41).

The petition alleges that on October 19, 1921, the Commission demanded access to the defendant corporation's records (p. 8), and annexes to the petition a copy of the demand then made (Exh. D), which declared that (pp. 15-16):

> "The Federal Trade Commission hereby formally demands an opportunity to examine *all* documentary evidence, including *all* documents, papers and correspondence in your custody or under your control in order that copies may be made of such portions of said documentary evidence as may be deemed relevant."

The petition then sets forth the defendant's refusal (p. 8) and avers "that the records, correspondence and written data so refused all related to respondent's business in interstate commerce" (*id.*), but this allegation, to repeat, is categorically denied in the answer (p. 35, par. 11), and is plainly inaccurate.

The business carried on by the defendant corporation is very extensive. It operates fourteen factories and has ten tobacco leaf buying and rehandling plants. It employs over ten thousand persons, and has about nine hundred salesmen, and about six thousand five hundred customers. In 1921, for example, its annual gross sales amounted to more than $83,000,000, and its federal taxes to over $22,500,000. It daily receives hundreds of letters and reports from its customers and sales force and others interested in the tobacco business. In addition, it has and keeps the usual books of record and account necessary in such a large business. Two hundred and

forty-nine employees, in addition to the executive officers, are employed in the New York office alone to look after its books, papers, correspondence, management, etc. Its correspondence, reports and books, particularly those of the last two years, are in constant use in its business. The manufacturing, sales, credit, administration, law, finance and accounting officers and employees necessarily consult and refer to this documentary evidence daily in order to discharge their respective functions and keep the business going. (See pp. 38-41, 44, 51-3.)

The extent and mass of the correspondence and other documentary evidence called for by the prayer for the writ of mandamus are set forth in the defendant company's affidavits submitted to the court below. Their nature and volume may be summarized as follows:

(1) The defendant corporation receives approximately a thousand communications every business day from its customers, and directs approximately fifteen hundred communications a day to them, constituting in the aggregate a total of seven hundred and fifty thousand per annum, at the rate of three hundred business days to the year.

(2) It receives considerably more than four thousand communications a week from its sales force, its nine hundred salesmen making daily reports and sending approximately six hundred letters a week. The defendant corporation in turn sends them about six hundred letters a week, exclusive of routine letters, circulars, checks, etc. In other words, there is an aggregate of not less than

two hundred and thirty thousand communications per annum to and from this source, counting fifty weeks to the year.

There are, consequently, about a million communications a year in the defendant corporation's business, and the greater part thereof relate to transactions in intrastate commerce.

The Federal Trade Commission, nevertheless, insisted in the court below that it had a right to access to all this correspondence and to every other book and paper which the company had; and it so insisted notwithstanding the fact that nearly one-third of the defendant's business did not constitute interstate commerce at all and had no relation thereto, and that more than one-half of the defendant corporation's correspondence related to intrastate transactions which are not within the jurisdiction of the Commission (pp. 38, 39, 41, 44).

Prior to the commencement of this proceeding, the Commission was afforded an opportunity to examine, and undoubtedly thoroughly examined, the books and records of the defendant company, and it was also offered the privilege of a like examination of the correspondence passing between the officers and employees of the corporation (p. 48). The Commission, however, asserted and insisted upon the right to "full and complete access to any and all documentary evidence in the possession or control of the P. Lorillard Company" (p. 17), and to a full and unrestricted examination of all the documents of the corporation, including all correspondence with its customers and others, without regard to the relevancy

of any such documents to any pending complaint or definite investigation or to any matter within the jurisdiction of the Commission. It insisted that it was entitled to examine and copy whatever it saw fit among the records and documents of any corporation engaged in interstate commerce without any limitation whatever, and that the mere fact that any part of a corporation's business related to interstate transactions opened all the records and documents of the corporation, including those pertaining wholly to intrastate business, to the Commission's unlimited and unrestricted access, possession, examination and right to copy. Thus, without any showing of reasonable necessity, or probable cause, or of any relevancy whatever to any proper inquiry, the Commission insisted in the court below upon pursuing an unlimited and unrestricted inquisition into the private affairs of the defendant corporation and of its customers and correspondents during the whole year 1921.

The Commission set forth in its petition four grounds upon which it relied to support its demand for an unlimited inquisition.

(1) The first basis stated for the inspection sought was the resolution adopted by the Senate of the United States, quoted above at page 6. This is a resolution of merely one house of Congress, and hence not a law in any aspect*, and plainly did not come within the terms of subdivision (d) of section 6 of the Federal Trade Commission Act which provides that the Commission should have power—

* *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, 329, affirming 212 Fed. 486, 492-3.

> "Upon direction of the President or either House of Congress to investigate and report the facts relating to any *alleged violations of the anti-trust acts by any corporation.*"

Nothing appears in the resolution of the Senate of August 9, 1921, quoted above (p. 6), which has any bearing whatever upon, or even makes mention of, the anti-trust acts of the United States or any violation thereof. The subject matter is entirely different.

Moreover, the demands for access and disclosure made upon the defendant corporation exceeded in scope and effect any investigation which this portion of the statute can reasonably be deemed to have contemplated or authorized. The "alleged violations of the anti-trust acts," as those acts are defined in the statute (see last paragraph of sec. 4), plainly relate only to interstate commerce and cannot be involved in the defendant corporation's intrastate business, which those anti-trust acts do not affect and do not apply to.

(2) The second basis for the exertion of inquisitorial power upon which the Commission relied in its petition (pp. 6, 7) was an alleged complaint made to it against the defendant company to the effect that (p. 6)—

> "The respondent was using certain methods or business practices resulting in unfair competition, in that it was regulating and fixing, or attempting to regulate and fix the prices at which the commodities sold by it should be resold by those to whom it had sold them, and was co-operating, aiding and abetting others to successfully formulate and carry out a scheme or combination, pursuant to which the resale prices of respondent's commodities should be fixed and

maintained by those to whom respondent had previously sold its products, or commodities."

No complainant was mentioned, and when the defendant company requested the Commission to name the alleged complainant, as stated above, it met with refusal (pp. 16, 18-19). The alleged existence of such a complaint was duly denied by the defendant company (ans. par. 6, p. 34). No time when any alleged wrong was done was mentioned by the Commission. No place throughout the entire United States was assigned to the alleged wrongful acts or any of them. No person was named to whom goods were sold, or with whom the defendant corporation co-operated to fix or regulate resale prices, or whom it aided or abetted in that respect, or whom it coerced or attempted to coerce into maintaining any resale price. The alleged illegal methods or practices of the defendant company were not disclosed or described in any particular whatever. No facts were stated in the petition from which the court itself could reasonably draw its own inference that there was probable cause for believing that any law had been violated. There was instead nothing in the petition save the Commission's unsupported conclusion of law, and its statement, above quoted, in Exhibit E to the petition for a mandamus that "the commission is including in this investigation an inquiry with reference to the *possible existence* of practices in violation of section 5 of the Trade Commission Act" (p. 16). In a word, the Commission was attempting to set afoot an unlimited roving inquiry and inquisitorial fishing expedition for evidence, not of any actual, but only of the *possible*, existence of a violation of law. The

brief now filed by the Commission purports to see in these vague and indefinite statements and surmises of the petition, all duly denied by the answer, a specific charge of violations of law sufficient to render the omnibus search and seizure reasonable and to show probable cause and thus warrant a court in authorizing an unlimited search of private papers.

(3) In striking and instructive contrast with the complete indefiniteness of the alleged "complaint" by "a possible applicant" concerning "the possible existence" of unfair and illegal practices (p. 16), there is before the court in this record what may conveniently be called the Philadelphia complaint, which the Commission annexed to its petition as Exhibit I (pp. 10, 24-30). Whatever its other defects and insufficiencies may be, this complaint stated a specific charge. It concerned definite acts, times, persons and places. But it dealt only with transactions in Philadelphia and did not purport to embrace or rove over the entire United States; and, moreover, it dealt solely with alleged misconduct during the year *1920* (pp. 25, 28). The quantity of documentary evidence properly pertinent to that charge would, therefore, seem to be reasonably limited and limitable.

But, as affirmatively appears from the defendant's affidavits (p. 43), since this Philadelphia complaint was formulated and served on May 31, 1922, "no demand has been made by the Commission for any books, records, correspondence, documentary data, etc., relating to the Company's business transactions with the persons named in said complaint, or any other persons doing

business in Philadelphia," and the defendant corporation further averred that it was willing "to produce for the hearing on this complaint its documentary evidence relating to said complaint whenever due demand is made by the Commission or is authorized by a court of competent jurisdiction" (*ib.*). The pendency of such a specific complaint, however, relating wholly to dealings in Philadelphia of a limited number of jobbers would not, it is confidently submitted, warrant or support a general subpoena calling for a mass of undefined documentary matter relating to all the dealings of the defendant corporation with all its customers throughout the whole United States during the period of one year, and that year, too, one subsequent to any of the alleged transactions mentioned in the Philadelphia complaint.

Moreover, since the decision in the court below, the Commission has heard the Philadelphia complaint and on February 16, 1924, made the following order therein:

> "This proceeding having come on for hearing before the Federal Trade Commission upon the complaint of the Commission, the answers of the respondents and the testimony and evidence, and the Commission being fully advised in the premises,
>
> "It is ordered that the complaint herein be and the same is hereby dismissed as against respondent P. Lorillard Company."

Manifestly the cause in the case at bar, so far as the Philadelphia controversy is concerned, has become moot. Without the writ of mandamus which is sought by it herein, the Commission, as its order demonstrates and expressly declares, was able to adduce the testimony and

evidence in the Philadelphia case and to become fully advised in respect of that charge to its own satisfaction and to make a final disposition thereof. Notwithstanding these facts, the Commission now urges that very complaint upon the court as a reason for reversal of the order of the District Court; and does so despite the fact that in its briefs and argument below it placed no reliance on the Philadelphia charge, but urged solely its alleged right to an unlimited inquisition regardless of any existing specific charge of violation of law or relevancy.

The prayer for relief in the petition now before the court for review (pp. 10-12), following in this regard the last demand of the Commission (Exh. G., pp. 21-23), calls for records and correspondence "during the period from January 1, *1921*, to December 31, *1921*, inclusive", while the Philadelphia charge relates only to the prior year, namely, *1920* (pp. 25, 28). It seems, therefore, to follow quite clearly that even if the writ of mandamus were granted to the Commission as prayed herein, it would require production of no documents bearing upon the Philadelphia controversy, since that controversy antedated the year 1921, and there is no allegation in the petition to show the contrary or to explain why in that relation any 1921 papers, or dealings throughout the entire United States, need be inquired into. No continuance of wrongful acts into 1921 is alleged. The Philadelphia complaint should, consequently, be disregarded as plainly irrelevant in any proper consideration and disposition of the case now presented to the court for de-

cision. Its allegations are, moreover, denied *in toto* (pp. 34, 35, 43-4, 49, 51). The statement in the Commission's brief (p. 11) that no copy of this defendant company's answer to the Philadelphia complaint is annexed to the answer herein, is inadvertently inaccurate. The answer to that complaint will be found at pp. 49-51 of the record.

It is submitted that the defendant corporation was clearly acting within its own constitutional rights and liberties, as well as within its duty to its customers and correspondents, when it challenged the right and power of the Commission to make any such unlimited search and seizure of its documents as the Commission argued for in the court below. The courts, it was and is believed, should protect both the defendant corporation and its customers and correspondents from this unnecessary and unreasonable invasion of their rights. As declared by the court in *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 46:

> "Undoubtedly the court should protect non-litigants from unnecessary exposure of their business affairs and papers."

See also *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445.

The unlimited power of inquisition into the private affairs of private state corporations engaged in no public business or calling whatever, which was claimed by the Commission in the case at bar, has never been sustained by any court, and it has been denied by several courts of original jurisdiction as well as by the court below. *United States* v. *Basic Products Co.*, 260 Fed. 472; *Maynard Coal Co.* v. *Federal Trade Co.*, 48 Wash.

Law Rep. 278; *Federal Trade Com.* v. *Baltimore Grain Co.*, 284 Fed. 886; *Federal Trade Com.* v. *Claire Furnace Co.*, 285 Fed. 936. Certainly no tribunal in any English-speaking country, so far as we have been able to ascertain, has ever upheld any such extravagant claim of inquisitorial power on the part of an administrative body.

(4) Finally, the Commission rested its claim of right to access and inspection of the documents in question upon the provisions of subdivision (a) of section 6 of the Federal Trade Commission Act (pp. 6-7) which declares—

> "That the Commission shall also have power to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in [interstate] commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relations to other corporations and to individuals, associations, and partnerships."

The petition does not allege that the Commission had called upon the defendant company for any report on any subject, as authorized by said section 6, nor that a report was refused, nor that it found any report made by the defendant company to be false, evasive, or incomplete (see ans. par. 16, subd. 6, pp. 36-37). On the contrary, the theory of the Commission appeared to be that it was warranted in commencing and prosecuting an unlimited inquiry, covering any period whatever and extending throughout the entire country, in relation to any business corporation engaged in interstate commerce and all of its relations to all of its customers, etc., and that,

in the course of such an inquisition and without any preliminary steps whatever, it was entitled, at any time and as often as it saw fit, to have access to and inspection and copy of all the books and correspondence of those under investigation.

The unreasonable and oppressive character of such an inquisition, its dislocating nature, its tendency to cause private business details and trade secrets to become public through unavoidable leakage, its detrimental effect upon the morale of the business under inquiry, its burdensomeness both in respect of expense and trouble to private parties, and its disruptive tendencies, need no detailed comment: they reveal themselves upon the slightest contemplation of the assertion of unlimited power alleged to be vested in this new administrative bureau or board (see also pp. 42, 45, 53.)

It was contended by the Commission in the court below that one of the purposes of this alleged grant of power by Congress to it was to enable the Commission to keep itself informed as to what was being done by every corporation engaged in interstate commerce. It is, of course, apparent that, if the Commission be right in its views, the alleged power can be constantly and repeatedly invoked by it in order that its grasp of affairs may never weaken and its knowledge be kept up to date. Such a power would mean that every business within the jurisdiction of the Commission would be unceasingly kept in tutelage by the Commission, that agents of the Commission could be ever present to observe and note every act, and that business corporations engaged in

interstate commerce could then do and know nothing without prompt and absolute disclosure to the Commission. It is true that it has been suggested that "there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce" (*Smith* v. *Interstate Com. Com.*, 245 U. S. 33, 43), but that was said of a corporation engaged in a public service; and thus far no court has ever made any such suggestion concerning the affairs of a wholly private business corporation and those with whom it had business relations.

It should be further borne in mind that this asserted unlimited power of search—as extensive, perhaps, as the most odious general warrant or writ of assistance ever issued or contemplated in England or America—is claimed by an administrative bureau or board in the absence of even a *scintilla* of proof of probable cause, or any oath or affirmation, or any complaint, or any showing of reason to believe that there has been a violation of law. The Commission planted its demand upon its curiosity and its wish to search, not for duly alleged or probable violations of law, but for *possible* violations, to the scope of which possibility there is, of course, no limit.

The unreasonable and oppressive nature of the demands of the Commission in the case at bar should also be appreciated by the court. Before this proceeding was begun the Commission had already had a complete inspection of every book of account of the defendant company, and it had seen and copied numerous papers and

documents (pp. 7, 20, 42, 48). Although the defendant did not believe the Commission entitled to any such extensive inspection, it, nevertheless, yielded for the sake of peace and in a spirit of coöperation (pp. 7, 35, 42). These investigations caused the defendant company much inconvenience and expense and interfered materially with its business (pp. 42, 45, 46-47, 53). The answering affidavits show uncontradictedly as follows (p. 53):

> "The commission's demand, if granted by the court, would cause great inconvenience and large expense to the company during the period of investigation. It would require the entire time of at least three (3) persons familiar with those files for a period of at least a month in order thoroughly to investigate and examine the contents of the filing cabinets which are kept and maintained in the company's executive office. These files are in constant use by the various departments; and if the demand were granted, a great deal of confusion and delay would be caused thereby. During previous investigations by the Federal Trade Commission and the Department of Justice a large portion of the company's correspondence was inaccessible to the employees of the company during the period of such investigation. The amount of expense to the company is practically impossible to determine, but the effect of such investigation is to completely demoralize the force connected with any particular department."

The Commission's demands, it should be remembered, called for an enormous quantity of documentary matter; all questions of relevancy, materiality and privileged communications were ignored; inspection was demanded regardless of whether the papers were or were not relevant, or competent, or related to intrastate or

interstate commerce, and there was no proof of and no definite charge or complaint. None of this was disputed by the Commission in the court below; but now an attempt is being made by the Commission to change front in this court and mend its hold. This ought not to be permitted.*

In a preliminary report to the Senate (Sen. Doc. 121, 67th Congress, 2nd Session, p. 35), the Commission had already made public the defendant company's income, learned upon the aforementioned investigation, not alone as the defendant itself had reported it, but as the Commission conceived it ought to be calculated. It had also disclosed the names of some of the customers of the defendant and of the American Tobacco Company. Yet no such matters come properly or fairly within the jurisdiction of the Commission to investigate, report, or disclose. If the Commission should see fit to publish any matter which it believes is not a trade secret, the defendant, although it may earnestly, and perhaps rightly, believe the contrary, is, nevertheless, powerless to prevent the injury, since the publication usually occurs without any prior notice. The prohibition in the act of Congress against publishing trade secrets and names of customers affords no practical protection in such a case. Opinions differ concerning what are trade secrets; but, as the Commission reads the statute, the defendant's opinion upon that score amounts to nothing, even though it alone will suffer damage if the Commission should be mistaken.

---

* *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267-8.

Furthermore, in May, 1922, the Department of Justice also conducted an investigation of the defendant company's books and papers for the purpose of discovering whether it had violated the anti-trust laws or the Federal Trade Commission Act (p. 36, ans. par. 18, subd. 4). The Commission in the case at bar practically sought to repeat this whole process. Surely, the very least that reason and justice could require to warrant or excuse the repetition of this burdensome process within so short a space of time should be a clear and distinct showing of facts tending to establish some probable cause or necessity for the second investigation. Particularly should that be the case where, as here, the statute distinctly provides, for the evident purpose of avoiding unnecessary duplication of investigations and interferences with business affairs (sec. 8)—

> "That the several departments and bureaus of the Government when directed by the President shall furnish the Commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the Commission as he may direct."

The court will, however, search the petition in vain for any allegations justifying or showing any actual necessity for a second search among the defendant company's papers and effects. *Mobile Gas Co.* v. *Patterson*, 288 Fed. 884, 889.

It should also be observed that the fact that the final demand of the Commission (Exhibit G, pp. 21-23) purported to be limited to the year 1921, signified nothing

as matter of fact. Even one year's transactions of such a corporation as the defendant would, as we have already seen, involve hundreds of thousands of documents, many, if not most, relating to intrastate commerce, and burden the corporation with serious interference, inconvenience and expense. But the Commission, as its pleading discloses and as its demands and correspondence show, was laying claim to an "unlimited right" to inspect books and documents, and so contended in the court below. If the 1921 papers were, therefore, to be opened to it, it would then be free to call for those of 1920, and then for those of 1919, and so on, until none of the defendant company's papers and records would remain uninspected and undisclosed. The alleged power of the Commission under subdivision (a) of section 6 of the Federal Trade Commission Act to carry on an unlimited investigation in order "to gather and compile information concerning . . . the organization, business, conduct, practices, and management of any corporation engaged in interstate commerce . . . and its relations to other corporations and to individuals, associations, and partnerships", purports to be a continuing power, and under it the right "to investigate from time to time", that is, to a continuous, endless and exhaustive examination, is claimed, and, as we have seen, has been asserted by the Commission.

I.

SENATE RESOLUTION NO. 129 DID NOT WARRANT GRANTING ANY RELIEF.

Subdivision (d) of section 6 of the Federal Trade Commission Act vests in the Commission power—

> "Upon the direction of the President or either House of Congress, to investigate and report the facts relating to any alleged violations of the antitrust acts by any corporation."

On August 9, 1921, the Senate passed a resolution (S. Res. 129) reading as follows (Exhibit A to petition, p. 12):

> "Resolved, That the Federal Trade Commission be, and is hereby, directed to investigate the tobacco situation in the United States as to the domestic and export trade, with particular reference as to market price to producers for tobacco and the market price for manufactured tobacco and the price of leaf tobacco exported, and report to the Senate as soon as possible the result of such investigation."

In the court below it was expressly conceded by the Commission in its main brief as follows (p. 69):

> "This investigation was undertaken under the powers granted to the Commission by the Federal Trade Act, and not upon the assumption that the Senate Resolution . . . conferred any power whatsoever upon the Commission in reference thereto . . .
>
> "The Senate Resolution did not add to, nor subtract from, the power of the Commission."

In the Commission's brief in this court, however, the Senate Resolution is relied upon as one of the grounds

in support of the application for the writ of mandamus (*e. g.*, pp. 4, 22)!

The Senate Resolution is clearly not a law of the United States. It is merely the declaration of one house of Congress, never approved by the other, nor concurred in by the President; and, as such, it cannot, of course, directly modify or enlarge the powers which are vested in the Commission under the Federal Trade Commission Act. And so it has, in effect, been adjudicated by this court. *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, 329, affirming 212 Fed. 486, 492-3. See also *United States* v. *Nashville, C. & St. L. Ry. Co.*, 217 Fed. 254, 260, and *Fed. Trade Com.* v. *Baltimore Grain Co.*, 284 Fed. 886, 887. The statutory authority of the Commission to the writ of mandamus is not, therefore, in any wise increased or affected by this resolution.

It is the settled rule of law that, in the absence of statutory authority, the United States District Courts do not have power to issue a writ of mandamus as an original and independent remedy. *United States* v. *Nashville, C. & St. L. Ry. Co.*, 217 Fed. 254, 259; *Knapp* v. *Lake Shore Ry. Co.*, 197 U. S. 536, 541-2; *In re Higdon*, 269 Fed. 150, 151-2; *Heine* v. *Levee Commissions*, 19 Wall. 655, 660; *Smith* v. *Bourbon County*, 127 U. S. 105, 112; *United States* v. *Louisville & Nashville R. R. Co.*, 212 Fed. 486, 492, affirmed, 236 U. S. 318. The Federal Trade Commission Act confers jurisdiction on the District Courts of the United States "to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the Com-

mission made in pursuance thereof." Hence the power to issue any writ of mandamus must of necessity be found in the Act.

Subdivision (d) of section 6 of the Act is the only provision which even remotely affects the point, and in order to fall within that provision, it is manifestly necessary, not only that one of the houses of Congress shall adopt a resolution, but that such resolution shall be a "direction . . . to investigate and report" concerning "*alleged violations of the anti-trust acts.*" Plainly nothing else will satisfy the statute, nor authorize the exercise of the Commission's statutory power, nor warrant resort to the courts for an original writ of "mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the Commission in pursuance thereof."

The Senate Resolution in question clearly is not a "direction . . . to investigate and report the facts relating to any alleged violations of the anti-trust acts by any corporation." Not a word is to be found therein about any violation or alleged violation of the anti-trust acts; not a word about monopolies or restraints of trade, and no mention of "any corporation" as an alleged offender against those laws. Indeed, no fact or particular of any kind relevant to any such violation is even hinted at. Certainly, if the Senate had desired that anti-trust law violations should be investigated by the Commission, it would have been easy for it to have aptly expressed itself to that effect. It must be plain that what it had in mind and intended in passing the resolution was, not anti-trust law violations or offenses by any

corporation, but rather such matters as would aid it in dealing with the tobacco products schedule in a new tariff act, or some similar piece of economic legislation. That being the case, the resolution did not and was not intended to have any bearing upon "alleged violations of the anti-trust acts by any corporation", and it may not, therefore, now be invoked to sustain proceedings instituted under the alleged authority of section 6 of the Federal Trade Commission Act. The main purpose of the investigation instituted by the Commission, as correspondence with the Commission discloses, namely, to fulfil the Senate Resolution (see *e. g.*, p. 16), is, therefore, *ultra vires* and in no way warrants the issue of a mandamus herein.

II.

CONGRESS DID NOT INTEND TO VEST IN THE COMMISSION UNLIMITED AND UNRESTRICTED POWER OF INQUISITION IRRESPECTIVE OF ANY PENDING COMPLAINT OR THE RELEVANCY OF EVIDENCE.

It should be emphasized that the Federal Trade Commission, as it distinctly argued below and as the record discloses, claims jurisdiction to exercise an unlimited and unrestricted power of inquisition over all the documentary evidence in the possession of any corporation engaged in interstate commerce, whether or not such papers relate to intrastate transactions, and regardless of their strictly private or privileged character, and quite regard-

less of the existence of probable cause or the relevancy of the documents.

1. An examination of the discussions in Congress when the bill was pending, which subsequently became the Federal Trade Commission Act, will show that it was not the intent of Congress to confer upon the Commission "an unlimited right of access to the books and records of a corporation under investigation or being proceeded against", as the chairman of the Commission asserted in the case at bar (p. 17); but that, on the contrary, Congress distinctly contemplated that searches under the act should be had only in cases of specific complaint of misconduct and upon due proof of probable cause, in strict compliance with the requirements of the Fourth Amendment. That clearly appears from the arguments in support of the bill. Thus, Senator Newlands, defending the measure against an attack by Senator Weeks, said (51 Cong. Rec., part 13 [63rd Congress, 2nd sess.] p. 12747):

> "In the second place, it seems to be assumed that all of the powers granted by the bill are to be applied to every corporation that comes within the jurisdiction of the commission, whereas, as a matter of fact, the power is simply given as it must be given to investigate all corporations; but of course investigation will only be made of those concerning whom there is some probable cause to believe that they are violating the law."

This assurance, however, did not satisfy Senator Brandegee, who declared that (p. 12800):

> "The commission would degenerate simply into a smelling committee to be dragged around to investigate people who were complained of by

> their competitors. As I have said, if private business, charged with no use of common carriers at all, simply because it operates beyond state lines is to have this Federal Commission imposed upon it as its guide and as its boss, you will simply raise up in this country such a protest against the whole idea of government by commission, as was never seen in the country before, and it ought to rise up."

Senator Cummins argued in part as follows (p. 12918):

> "I concede at once that we cannot confer upon a commission the power to investigate simply for the purpose of securing interesting or valuable information. I do not think we can confer upon a commission all the powers that Congress itself has with regard to investigation, because Congress can investigate any subject that may develop facts which may be material in determining what our legislation ought to be in the future. We must limit our delegation of authority, so far as inquisition is concerned, to a subject not only upon which we have the constitutional right to legislate, but upon which we have legislated, so that the investigation is connected with the enforcement of a law."

Thereupon, Senator Lewis also took up the defense of the bill and declared that inspections of books and papers under the proposed law could be had "only when there had been some complaint that the law has been violated. . . . Then . . . and then only, will there arise the privilege of the examination" (p. 12927; see also p. 12928 and pp. 12806-11), and he conceded that there would have to be some specific complaint of wrongdoing, adding—"Such is my conception of the act. *Otherwise I could not see its justification.*"

2. An unlimited power of inquisition, or an unlimited right of access to books and papers of private parties, not engaged in any public service, or a search without basis in some state of fact tending to establish probable cause or a specific charge of wrongdoing, is without sanction in our law. *Kilbourn* v. *Thompson*, 103 U. S. 168, 190; *In re Pacific Ry. Commission*, 32 Fed. 241; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 478, 479; *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407; *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, 335-6; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 444-5; *United States* v. *Basic Products Co.*, 260 Fed. 472, 482; *Federal Trade Commission* v. *Baltimore Grain Co.*, 284 Fed. 886, 890; *Federal Trade Commission* v. *Claire Furnace Co.*, 285 Fed. 936, 940-1. In *Interstate Commerce Commission* v. *Brimson*, *supra*, Mr. Justice Harlan said:

> "We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. *Neither branch of the legislative department*, still less any merely administrative body, established by Congress, possesses, or can be invested with a general power of making inquiry into the private affairs of the citizen. Kilbourn* v. *Thompson*, 103 U. S. 168, 190 . . .
>
> "It was said in argument that the twelfth section was in derogation of those fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen. It is scarcely necessary to say that the

* On this score see also Miller's Lectures on the Constitution, p. 415; *In re Pacific Railway Commission*, 32 Fed. 241, 250; *Matter of Foster*, 139 N. Y. App. Div. 769; *Matter of Barnes*, 204 N. Y. 108, 118.

> power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guarantees."

In the leading case of *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 417, 421, a claim of virtually unlimited inquisitorial power over common carriers was pressed upon this court by the Interstate Commerce Commission, but it was emphatically overruled, even in the case of such public service corporations.

It should be borne in mind that the authoritative pronouncement of this court in the *Harriman* case was made in response to precisely the same contentions as were pressed upon the court below by the Federal Trade Commission. The broad power of Congress over interstate commerce; the necessity for the fullest knowledge of the facts on the part of the Interstate Commerce Commission, if it was intelligently and advisedly to aid Congress in enacting future remedial legislation; the apparently unlimited provisions for investigation contained in the Interstate Commerce Act,—all these were urged in justification of the claim that Congress had conferred unlimited inquisitorial power upon the Interstate Commerce Commission. In addition, there was also the very important circumstance that the corporations there affected were all engaged in public service and had, therefore, voluntarily subjected their property to a public use. Manifestly such corporations were, in the nature of things, properly subject to much greater visitatorial power than corporations engaged exclusively in ordinary private business. Nevertheless, as we have seen, the court overruled the contention of the Inter-

state Commerce Commission, and Congress has not since amended the Interstate Commerce Act in any such manner as would raise the constitutional questions then declared by the court to be doubtful and left undecided or "present the constitutional difficulty in most acute form". The case now before the court so presents it.

It is not reasonable to suppose that Congress intended to confer any broader visitatorial power upon the Federal Trade Commission than it ever has conferred upon the Interstate Commerce Commission. It is certainly not to be assumed that Congress meant to disregard the deliberate holding of this court in the recent *Harriman* case; and the discussions in the Senate, quoted above, plainly indicate the contrary. Manifestly, if Congress had intended to lay private business corporations under a severer burden of investigation and disclosure than it had ever found necessary or expedient in respect of public servants engaged in interstate commerce, it would have employed the clearest and most unequivocal language to that end. Speaking of a similar contention in reference to the Interstate Commerce Commission and the public service corporations subject to its jurisdiction, in *United States* v. *Louis. & Nash. R. R.*, 236 U. S. 318, 335-6, Mr. Justice Day said:

> "If Congress intended to permit the Interstate Commerce Commission to authorize examiners to seize and examine all correspondence of every nature, Congress would have used language adequate to that purpose. A sweeping provision of that nature, attended with such consequences, would not be likely to have been enacted without probable exceptions as to some lines of correspondence required to be kept open and subject to inspection upon demand of the agents of the Government."

The court will, however, search the Federal Trade Commission Act in vain for any language adequate to any such purpose as the Commission asserts in the case at bar. The statute contains nothing in any wise calculated to supersede or nullify the effect of the decision of this court in the *Harriman* case. Even if that could have been validly attempted by Congress, which is denied, there is not a particle of evidence to establish that that was in fact attempted. It is, therefore, submitted that the doctrine of the *Harriman* case should be regarded as conclusive and controlling herein.

The claim of unrestrained power of inquiry and access has been made by the Federal Trade Commission before other tribunals, but thus far it has not won the approval of any court. District Judge Orr rejected the contention in *United States* v. *Basic Products Co.*, 260 Fed. 472, 482, as follows:

> "Counsel for the defendant urges upon this court the necessity of declaring section 6 of the Trade Commission Act to be unconstitutional, not only 'in so far as it authorizes investigations and compulsory disclosures of matters which are beyond the commerce power of Congress,' but also 'in so far as it attempts to authorize a search or seizure by an administrative agency of the Government without charge or suspicion of wrongdoing.' While the contention of counsel is probably sound, this court does not deem it necessary to go farther than to hold that the commission have not the power to carry on investigation which they have assumed in the present case."

In the case at bar, the court below in overruling the claim of the Commission to unlimited access to documentary evidence, declared (record, pp. 59-60; 283 Fed. at p. 1005):

"The phrase of the Federal Trade Commission Act considered, in view of the language in the *Harriman* case, would indicate that the right to procure information in its investigations under the provisions of section 6 would not grant the unlimited search and inspection of correspondence with the right to copy the same in the absence of some specific complaint which would point out the materiality to that complaint of the particular correspondence and papers sought to be obtained.

"Reading sections 5, 6 and 9, I do not think that Congress intended, at the time of the enactment of this law, to go beyond the well-recognized principles of limitations with reference to searches and seizures guarded against by the Fourth Amendment of the Constitution. . . .

"This command of the Constitution [i. e., the Fourth Amendment], properly interpreted, is a prohibition against Congress granting powers to the Commission for unlimited searches and seizures of letters and documents. The act makes plain the duty of the Commission to gather, compile, and publish for use in its proceedings what may be voluntarily offered or submitted in response to request or demand. It may also make investigation independently, but the exercise of visitorial power over private corporations must keep within restrictions of the Fourth Amendment. 'Neither branch of the legislative department, still less any merely administrative body, established by the Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen.' *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 478."

District Judge Rose ruled to like effect in *Federal Trade Commission* v. *Baltimore Grain Co.,* 284 Fed. 886, 890, saying:

"If [the Federal Trade Commission Act] really means that, whenever the commission thinks

> best to make an inquiry into the way in which some great department of commerce is carried on, it may send its employees into the office of every private corporation which does an interstate business in that line, and empower them to go through the company's books, correspondence, and other papers, I am satisfied it goes beyond any power which Congress can confer, in his way, at least."

And in *Federal Trade Commission* v. *Claire Furnace Co.*, 285 Fed. 936, 940-1, the Court of Appeals of the District of Columbia used the following language:

> "The Commission is not proceeding upon any complaint filed before it, charging complainants with unfair competition, or the violation of the Federal Trade Commission Act, or the Anti-Trust Acts. Neither is it the expressed intention of the Commission to make an investigation relative to the operations of complainant companies in interstate commerce. The investigation seems to be more in the nature of a news-gathering expedition, in hope of securing something of public interest for publication, or possibly subject-matter for future legislation by Congress. Common justice would seem to demand that before the business methods pursued by a corporation or an individual should be investigated, the party should be apprised either by a formal charge or by notice of the extent of the purposed investigation, in order that a day in court may be accorded. This is essential to determine whether the Commission is acting within its jurisdiction and to meet the charges preferred."

3. The provisions of the Federal Trade Commission Act also show that Congress did not intend to authorize the Commission to proceed to an inquisition into private papers in the absence of any charge or showing of probable cause.

The terms of subdivision (d) of section 6 of the Act providing for investigations to determine whether there have been "any violations of the anti-trust acts by any corporation," clearly contemplate and imply specific charges of wrongdoing of the sort named in the subdivision, and inquisitorial proceedings against and compulsory disclosures by private parties only upon the existence of such probable cause therefor. The same is true in substance of investigations instituted to determine whether section 5 forbidding unfair methods of competition in interstate commerce has been violated.

It only remains to consider whether subdivision (a) of section 6 authorizing the Commission "to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in [interstate] commerce . . . and its relation to other corporations, and to individuals, associations and partnerships," reasonably indicates that Congress intended to vest "the enormous scope of the power asserted for the commission", notwithstanding the fact, as Mr. Justice Holmes declared in the *Harriman* case (211 U. S. at pp. 417-8), that "no such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court."

It is submitted that, if the present statute grants any such "unlimited command" as the Commission now claims, it is unconstitutional; for it would then purport to authorize unreasonable searches, and unlimited and continuous extortions of evidence from private parties,

without the slightest regard for reasonable necessity or the existence of probable cause, without the suggestion of supporting oath or affirmation, and without even the most perfunctory effort at particularity of description. It would not only attempt to legalize unreasonable searches, but would attempt to authorize their constant repetition as well. Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. 241, 250, firmly challenged a similar assertion by a Congressional commission of unlimited power to compel disclosures by private parties, and declared that—

> "There is no doubt that Congress may authorize a commission to obtain information upon any subject which, in its judgment, it may be important to possess. . . . But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters."

And Circuit Judge Sawyer, agreeing with him, added (at p. 263):

> "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing, where the practice under it would end."

See also *Interstate Commerce Commission* v. *Brimson*, 154 U. S. at p. 479.

It seems, however, unnecessary to press this particular question to a final conclusion. The courts do not resolve constitutional doubts except where that is unavoidable. The rule is well expressed in the following excerpt from the opinion of the late Chief Justice in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407-8:

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templar Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman* v. *Interstate Com. Com.*, 211 U. S. 407."

See also *Texas* v. *E. Texas R. R. Co.*, 258 U. S. 204, 207; and *Arkansas Gas Co.* v. *Railroad Commission*, 261 U. S. 379, 383.

In the case at bar, however, there is a reasonable and restrictive construction of subdivision (a) of section 6 which will avoid at least some of the grave constitutional questions which have been raised. The key to this construction is contained in the next

subdivision of the same section, in which, as will be seen upon perusal, the Commission is granted the right to "require" corporations coming within its jurisdiction to make reports concerning their affairs and thus to furnish to the Commission "such information as it may require" (sec. 6, subd. b). It follows, therefore, that the method which the Commission should pursue when it has determined upon a general inquiry of the nature described in subdivision (a) of section 6, is in substance to call upon the corporations in question to report upon specified matters, as provided in subdivision (b). *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 422. Of course, if the reports are satisfactory, that ends the matter; but if they are found to be false, or only half-truths, or evasive upon some matter which the Commission is entitled to know, the Commission may, upon proper showing of probable cause, demand further disclosure and due access to and inspection of specific, necessary and relevant unprivileged papers. There might then appear to be some reasonable necessity for such a search; there would be a definite complaint charging a specific wrong, and the inquiry would have reasonable and readily enforcible limits. Reading subdivisions (a) and (b) of section 6 together in this manner would probably effectuate the intent of Congress and produce a harmonious and probably constitutional result. *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, 335-6. But, in the case at bar, no such orderly procedure was adopted by the Commission; on the contrary, without any preliminary steps whatever to obtain a report, it at once made a demand for

unlimited access to all of the defendant corporation's papers (pp. 36-7, ans. par. 18, subd. 6).

The court below construed section 6 to the above effect, as follows (283 Fed. at p. 1006):

> "Section 6 (b) grants to the Commission the right to require corporations coming within its jurisdiction to make reports concerning their affairs and thus to furnish to the Commission such information as it may require. And subdivision (a) of section 6 calls upon the corporations in question to report upon specific matters as provided in subdivision (b). If the corporations fail in reporting or the reports are false, the Commission is entitled, upon properly showing the probable cause, to demand due disclosures and access to the inspection of any specific, necessary, and relevant papers, excluding such papers as may be privileged. In other words, there must appear to be some reasonable cause for a search such as a definite complaint charging a specific wrong and thus presenting an inquiry which would have reasonable and readily ascertainable limits. Such a construction of subdivisions (a) and (b) of section 6 would effectuate the intent of Congress and the procedure can be kept within constitutional limits. *United States* v. *L. & N. R. Co.*, 236 U. S. 318; *Veeder* v. *United States*, 252 Fed. 414. Such a construction would seem to be in accord with the discussions in the Senate when this legislation was enacted. See 51 Congressional Records, pt. 13, 63d Cong., Second Session, pp. 12747, 12800, 12806-11, 12918, 12927. It was not intended to grant an unlimited power of inquisition or an unlimited right of access to books and papers of private parties not engaged in any public service or a search without basis of some facts tending to establish a charge of wrongdoing."

It does not meet the objections of the defendant corporation to argue, as the Commission did in the *Claire*

Furnace Company case recently submitted to this court and now does again, that Congress, and the Commission as its delegate, must have full information and unlimited access thereto in order to enable Congress to legislate. The logical outcome of that contention cannot stop short of the utter nullification of the mandate of the Fourth Amendment to the Constitution. It may be that unlimited inquisition into private affairs would result in complete and encyclopaedic knowledge by the Commission and the Government of everything; but it is certain that it would leave nothing of the Fourth Amendment and be unprecedented "in constitutional times". The framers of the Constitution plainly intended to prevent any such result. The mere speculation or possibility that information might turn up which might be useful to Congress, could no more have been deemed by them to afford a proper basis for a fishing expedition, than the general warrants or writs of assistance to the same end, which it was their undoubted purpose to condemn and forever ban. "A fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up" was held by this court to be "beyond the powers of the [Interstate Commerce] Commission." *Ellis* v. *Int. Com. Comm.*, 237 U. S. 434, 445.

Clearly the same evil practice, prohibited from the beginning of our Government, cannot be rendered lawful merely because invoked by the Federal Trade Commission. Private business is, we submit, not under any such crippling and oppressive disability; and the Commission, which was created to aid and foster business,

was not vested with any such despotic power. If every detail or secret of every corporation engaged in interstate commerce must be disclosed to the Commission, for its innumerable agents and employees to know and for its records to reveal, what safety is there for private enterprise? Today a host of the Commission's employees learn every detail and secret of a business. Tomorrow many leave the employ of the Government and find positions with competitors of concerns investigated. The public records show that 2,112 persons were at one time or another in the employ of the Commission up to June 30, 1923, and that on that day only 308 still remained in its employ. Are millions and millions of dollars worth of hard-earned private wealth, good-will and trade-secrets to be held by their rightful owners at such a peril? Has private business no means of protection except the honesty and discretion of the multitude of persons of all sorts who from time to time find employment with the Commission? Plainly this clear and inevitable danger and damage to private rights outweighs whatever good there may be in the speculative possibility that something useful to Congress may, peradventure, be turned up by the Commission in the course of an unlimited and endless quest for information.

4. No court or commission has ever before been granted any such unlimited inquisitorial power as the Commission now claims. A general and unlimited subpoena duces tecum has always been held to be void, as have also been subpoenas far more definite and restricted in scope than the demand herein in question. *Hale* v. *Henkel*, 201 U. S.

43, 76-7; *Wilson* v. *United States*, 221 U. S. 361, 376; *United States* v. *Terminal R. Assn.*, 154 Fed. 268, 272; *Hoppe* v. *W. R. Ostrander & Co.*, 183 Fed. 786; *Mobile Gas Co.* v. *Patterson*, 288 Fed. 884, 885; *Ex parte Brown*, 72 Mo. 83, 93; *Carson* v. *Hawley*, 82 Minn. 204. In *Hale* v. *Henkel*, *supra*, this court declared:

> "We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd case*, the substance of the offense is the compulsory production of private papers, whether under a seach warrant or a subpoena *duces tecum*, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the subpoena *duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its orgnization from more than a dozen different companies, situated in seven different States in the Union . . .
>
> "Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their

> materiality produced, to justify an order for the production of such a mass of papers . A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex parte Brown*, 72 Missouri, 83; *Shaftsbury* v. *Arrowsmith*, 4 Ves. 66; *Loe* v. *Angus*, L. R. 2 Eq. 59."

Ex parte Brown, 72 Mo. 82, which is thus cited with approval by this court in the preceding extract, involved a subpoena which called for the production of the following documents:

> "Dispatches between Dr. J. C. Nidelet and A. B. Wakefield and Wm. Ladd and J. C. Nidelet, and Wm. Ladd and Dr. Nidelet, between Warren McChesney and A. B. Wakefield, between Warren McChesney and J. C. Nidelet, between the latter and John S. Phelps, between A. B. Wakefield and John S. Phelps, between the latter and William Ladd and between George W. Anderson and A. B. Wakefield, sent or received by or between any or all of said parties within fifteen months last past."

In holding that process to be void under a provision of the Missouri bill of rights, which is similar to the Fourth Amendment, the court said:

> "The section declares that the people ought to be secure, in their papers, from unreasonable searches, and whether a subpoena *duces tecum* for papers, or a search warrant for chattels, be issued, the spirit of that section demands that while in the latter case there must be probable cause, supported by oath or affirmation, with a description in the warrant of the place to be searched, or the thing to be searched for, in the other, it shall at least give a reasonably accurate description of the paper wanted, either by its date, title, substance or the subject it relates to, and that it shall be shown to the court or authority

issuing the process that there is a cause pending in a court and that the paper is material as evidence in the cause . . .

"Here, communications, at different times, within a period of fifteen months, sent or received by the parties named, are called for. The date, title, substance, or subject matter of none of them is given, and it is utterly impossible that it could have been made to appear, without more, that any of the messages were material as evidence before the Grand Jury. Moreover, it not only called for all messages between the parties named, but for all which may have been sent or received by either of the parties, to or from, any person on the face of the earth. A compliance with the order might have resulted in the production of confidential communications between husband and wife, client and attorney, confessor and penitent, parent and child. Matters which it deeply concerned the parties to keep secret from the world, and of no importance or value as evidence in any cause, might thus be disclosed to the annoyance and shame of the only persons interested."

In *Carson* v. *Hawley*, 82 Minn. 204, the witness was not required to respond to a subpoena demanding all his books for the period of three months. The court held that:

"To require the production of all the books and papers of any person, of his business, for a period of three months, does not indicate any knowledge on the part of the person demanding of a particular piece of evidence, or of any book or paper desired, and permits the allowance of an improper inquisition into the affairs of the witness, outside of the scope of the judicial inquiry then under investigation. No party can be allowed to fish for evidence in this way. To permit such a course would deny the privilege of the citizen to protection from improper search and seizure of his papers, in violation of his plain constitutional right in that respect."

In the present case the court below expressed similar views, saying (record, p. 61; 283 Fed. at p. 1006):

> "In the papers submitted on this application, there is no showing of the existence of probable cause. The relief prayed for is in general terms and includes all papers and telegrams received by each respondent from its jobber customers located in different points throughout the United States and copies of all letters and telegrams sent by each respondent to such jobbers during the period from January 1, 1921, to December 31, 1921, inclusive. Such general demands made in other warrants of law, such as subpoenas *duces tecum*, have been condemned as not giving a reasonably accurate description of the papers wanted, either by date, title, substance, or subject to which they relate" (citing cases).

Contrary to the assertions now repeatedly made in its brief in this court, the Commission has seen fit to make no showing whatever of any necessity or probable cause for the search which it desires in the case at bar, nor any proof of the materiality of any of the documents which it has called for, nor even given any specific description of any particular proofs to which it wishes access. In the court below there was practically no denial of this fact. The simple truth is that the Commission does not know what it is seeking, and, therefore, it must needs demand a limitless search. It has, however, frequently been held that—

> "Seeking the production of papers and documents for the purpose of finding out whether or not they contain information valuable to the party demanding them has been aptly denominated a 'fishing examination', and is always regarded as oppressive, and as such denied" (*United States* v. *Terminal R. Assn.*, 154 Fed. 268, 272).

See also the recent well-considered case of *Mobile Gas Co. v. Patterson*, 288 Fed. 884, 885, and the authorities there cited.

5. Upon the argument in the court below no denial was made by the Commission that it was seeking an unlimited investigation of the defendant company's papers and documents. The brief of the Commission in this court, as well as the assignment of errors, however, now urges such a denial (see, *e. g.*, brief, pp. 40, 46, 53; assignments of error Nos. 22-6, 28-9, pp. 68-9). The fact that the petition prayed disclosure of the papers and documents for the year 1921 is pointed to as though that were any sufficient or actual limitation. As we have seen, it is not only a wholly artificial and arbitrary specification, doubtless adopted only temporarily and for the mere convenience of the Commission, but it calls for about a million papers and documents. But even more important than that, however, is the fact that once that demand is complied with, there is no security or assurance in law or fact that another similar demand for 1920, and then one for 1919, and so forth, will not be made, until, in the end, every paper and document which the defendant company has will have been in the hands of the Commission and its employees for copying and inspection. The power pursuant to which the Commission claims to be acting, is asserted by it to be *unlimited* (see, *e. g.*, record, pp. 17, 47). It is, in its view, restrained by no period of time, definition of issues, specific complaint, or defined investigation or subject matter. The Commission declares that anything and everything

which the defendant corporation has in the way of documentary evidence may be looked at and copied by the Commission in order to discover whether it may not possibly afford some basis for some kind of future action by Congress or inquiry by the Commission. To that boundless purpose, the Commission seeks to commence its investigation by requiring the production of the papers for 1921. When it is through with them, it will, and, under its views, it is at liberty to demand the remainder in one or more instalments. There is manifestly no stopping place short of absolute and total disclosure, except such as the convenience or indulgence of the Commission may dictate.

In brief, the situation is the precise opposite of that which obtains in a proceeding in court. In such a proceeding, the pleadings define the issues, and the court is in duty bound to confine the proofs within those issues. The rules of pleading, evidence and procedure also operate to restrict the scope of the proofs, and subpoenas and discoveries in relation to the controversy, therefore, have some clear and ascertainable limits. But, if the Commission be right in its contentions, it must be evident that there are and can be no limits to its visitatorial power except its own will. That, we insist, never was, or validly could have been, the intent of Congress.

6. In section 9 of the Federal Trade Commission Act the Commission is given "power to require by subpoena . . . the production of all such documentary evidence relating to any matter under investigation."

Manifestly, it must have been the intent of Congress thereby to confer upon the Commission the powers which courts ordinarily have to subpoena documentary evidence. But may it properly or reasonably be presumed that Congress intended to go further and to free the Commission from the well-established limitations upon the power which, as we have seen, have always bound the courts in the issuance of subpoenas? The claim of a greater power in a mere administrative commission than inheres in the judiciary would be at least extraordinary (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 478), and, therefore, in this case the Commission carefully sought to evade the question by making no resort to the writ of subpoena. Instead it directed an order for the production of papers to the defendant company, and, upon the latter's failure to comply therewith, applied to the court below for a "mandamus commanding [the defendant company] to comply with the order of the Commission."

The limitations upon the power to issue subpoenas duces tecum arise out of the most fundamental considerations of fairness and justice and due deference to our organic law. They are of the very essence of liberty. Nothing but the most unequivocal language should, therefore, be deemed to disclose an intent on the part of Congress to ignore them or set them aside; and there is not the slightest evidence of any such intention in the Federal Trade Commission Act, or the circumstances attending its enactment.

III.

THE CONSTITUTIONAL RIGHTS OF THE DEFENDANT UNDER THE FOURTH AMENDMENT.

In the recent case of *Gouled* v. *United States*, 255 U. S. 298, this court again had occasion to consider the meaning and effect of the Fourth Amendment to the Constitution, and it was once more declared by the unanimous court that (p. 303)—

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd* v. *United States*, 116 U. S. 616, in *Weeks* v. *United States*, 232 U. S. 383, and in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments, *i. e.*, the Fourth and the Fifth. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen,—the right to trial by jury, to the writ of *habeas corpus* and to due process of law. It has been repeatedly declared that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers.
>
> "In the spirit of these decisions we must deal with the questions before us."

Accordingly, it has become the settled rule of constitutional law that the substantial prohibitions and guaranties of the Fourth Amendment are not to be evaded or effectually denied by any subterfuge, and that whatever may be the attempted means—whether by a compulsory extortion of private papers as an alternative to a damaging inference or result (*Boyd* v. *United States*, 116 U. S. 616), or by a subpoena duces tecum (*Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Hale* v. *Henkel*, 201 U. S. 43), or otherwise (*Weeks* v. *United States*, 232 U. S. 383),—they must all alike be held futile if, in substance and effect, they bring about an unreasonable search and seizure. In the case at bar, therefore, it is immaterial that the search is attempted through the instrumentality of a demand for access and inspection by the Federal Trade Commission and an application to the court for a writ of mandamus. The search, however called or however attempted, must in any case be justified as if it were being sought under a warrant; in other words, the Constitution must be complied with in every substantial particular according to its spirit as well as its letter.

It is likewise so well established as to be no longer debatable, notwithstanding the Commission's assertion to the contrary in its brief (p. 49), that a corporation is entitled to invoke the guaranties of the Fourth Amendment against unreasonable searches and seizures in as full a measure and to the same extent as any natural person. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Hale* v. *Henkel*, 201 U. S. 43, 75-6; *In re Tri-*

State Coal & Coke Co., 253 Fed. 605; *United States* v. *McHie*, 194 Fed. 894, 898; *United States v. McQuade*, U. S. D. C., E. D. N. Y., Thomas, D. J. (not reported); *Coastwise Lumber & Supply Co.* v. *United States*, 259 Fed. 847, 849. Nothing even vaguely suggesting the contrary was held in *Essgee Co.* v. *United States*, 262 U. S. 151, quoted by the Commission (brief, p. 49). Indeed, the court below in that case, whose views were sustained by this court, expressly conceded in its opinion: "That the papers of a corporation, as well as those of an individual, are immune from unlawful searches and seizures, is a proposition established beyond cavil; and it is also one which this court has no wish to impair." See opinion of Knox, D. J., at p. 89 of the record in *Essgee Co. et al.* v. *United States*, Oct. Term, 1922, No. 706.

The foregoing decisions upholding fundamental principles give due effect to the clear mandate of the Fourth Amendment to the Constitution of the United States that—

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Applying the criteria thus emphatically laid down in the Constitution to the case at bar, it must necessarily follow that the general and unlimited search among the defendant company's papers and effects, for which the Commission now invokes the approval of this court, would, if granted, violate the letter and spirit of the constitutional guaranty.

1. The court will particularly note that the Commission's pleading, even without regard to the defendant's denials, does *not* show any "probable cause," and that it is *not* "supported by oath or affirmation" in the sense of the Constitution. That was not disputed by the Commission on the argument or in the briefs in the court below. The argument addressed to the Circuit Judge boldly claimed that the Commission had an unlimited right of inquiry, quite regardless of the existence of a specific charge, or probable cause, or oath, or affirmation. The Commission, therefore, did not aver that it required the search with regard to any *specific charge* of violation of the Federal Trade Commission Act; and, as has been shown above, it set forth no facts whatever in its petition tending to prove that there was any ground in truth for such a charge. There was, in fact, not even a pretense of the existence of "probable cause"; for it is expressly conceded in the petition that the search is sought, not because facts amounting to probable cause are known to and stated by the Commission, but merely, as the petition expressly declares (pp. 6-7), "in order that it might be determined whether there was reason to believe that an unfair method of competition had been or was then being used." In fact, it was expressly stated and conceded by the Commission that the inquiry was "with reference to the *possible* existence" of violations of the law (p. 16).

In other words, the search was demanded, not because probable cause presently and in fact was believed and shown to exist, as required by explicit constitutional

mandate, but only to enable the Commission to discover "*the possible existence*" of cause and to determine whether or not there was any cause, probable or otherwise, for any complaint at all. Manifestly, to sustain such a claim would be to nullify the clear intent of the Constitution; it would wipe out the conditions of probable cause and due oath or affirmation as pre-requisites to any search, and render them practical nullities; and, in truth and effect, it would amount to an assertion that the Commission is entitled to conduct an unreasonable search and fishing expedition pure and simple under the cover of a writ of mandamus.

It must be distinctly borne in mind that the responsibility for permitting a search of private papers, through the medium of a writ of mandamus, precisely as through the medium of a search warrant, rests wholly upon the court. Unless the court orders it, no such search can be had. The court below was, therefore, required to be satisfied in its own conscience, both as matter of law and as matter of fact, that probable cause for the search actually existed; and it would be immaterial for that purpose that the officer or board desiring the search protested a belief in the existence of probable cause, although in the case at bar even that feature is non-existent. The court, however, may only be satisfied of the existence of probable cause by due proof, that is, not by mere suspicions, or beliefs, or surmises, but by facts sufficiently alleged and duly "supported by oath or affirmation." *Veeder* v. *United States*, 252 Fed. 414, 418, 419, 420, certiorari denied, 246 U. S. 675; *United States* v.

Baumert, 179 Fed. 735, 737-8; *United States* v. *Premises in Butte, Mont.,* 246 Fed. 185, 186; *United States* v. *Pitotto,* 267 Fed. 603, 604; *United States* v. *Rykowski,* 267 Fed. 866, 868-9; *United States* v. *Kelih,* 272 Fed. 484, 488; *United States* v. *Ray & Schultz,* 275 Fed. 1004, 1005; *United States* v. *Kelly,* 277 Fed. 485; *United States* v. *Kaplan,* 286 Fed. 963, 969; *United States* v. *Harnich,* 289 Fed. 256, 258. In the *Veeder* case, *supra,* the Circuit Court of Appeals for the Seventh Circuit declared as follows:

> "No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises—but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right . . . The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser. . . .
>
> "Applying these principles to McIsaac's affidavit, we observe that not a single statement of fact is verified by his oath. All he swears to is that 'he has good reason to believe and does verily believe' so and so. He does not swear that so and so are true. He does not say why he believes. He gives no facts or circumstances to which the judge could apply the legal standard and decide that there was probable cause for the affiant's belief. There is nothing but the affiant's application of his own undisclosed notion of the law to an undisclosed state of facts. And under our system of government the accuser is not permitted to be also the judge. . . .
>
> "We thoroughly agree with the learned District Judge that the shield of the Constitution does

> not protect property that has been used in the commission of a felony, and that such outlaw property is subject to seizure by search warrant under this statute. But we find that the Constitution and this statute forbid a search warrant unless the issuing magistrate shall first properly draw the necessary legal conclusion from facts duly presented to him under the oath of the accuser. And in the record now before us we find no such presentation of facts."

The foregoing quotation is applicable in full to the case at bar. The petition sets forth that a complaint charging unfair methods of competition was made to the Commission (p. 6); but, as we have seen, no facts of any kind to show that the charge was in any manner supported, or was more than a mere belief, or surmise, or suspicion, are alleged. Even the person who made the charge was not disclosed. It will be manifest from an inspection of the petition that there are no facts alleged from which the court can draw its own conclusion as to whether there was or was not, in fact or in law, any unfair method of competition used, or other violation of the Federal Trade Commission Act committed. Indeed, the complaint referred to in the petition is far more vague and indefinite than that which this court described as "a vague general complaint charging unfair methods of competition" in the case of *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 580. Nevertheless, the court is urged, on such an unsubstantial basis, and in defiance of the Constitution, to authorize a most extensive search, and to recognize and approve the Commission's claim of "an *unlimited* right of access" to and an unrestricted examination of all the books and

papers of the defendant company, and thus to find and declare that probable cause for such an extraordinary search exists, when, in truth, all that the court now has before it indicates merely that there has been in this case only what there was in the *Veeder* case, namely, an application by the Commission of its "own undisclosed notion of the law to an undisclosed state of facts."

Not only are there no facts establishing probable cause disclosed in the petition, but it is clear as well that there is not the support by oath or affirmation which the Constitution imperatively requires. The entire petition is on information and belief (p. 5), and the verification (p. 12), which is by the secretary of the Commission, states that—

> "The sources of deponent's information and the grounds of his belief are: books, papers, documents, and records of petitioner in his possession as secretary of petitioner, statements made to him by members of the Commission, by its agents and employees."

What the documents and records referred to by the secretary actually are, and what is in fact shown by them, or what the statements are which were made to him, nowhere appears. The court would, therefore, in any event be unable to place its own appraisal upon the probative value and reliability of the matters which underlie the secretary's assumptions and beliefs. Not only was the secretary evidently relying entirely upon pure hearsay, but, as it is reasonably certain that the agents and members of the Commission could not have first-hand knowledge themselves, it was in all probability mere repetition of hearsay which the secretary had in mind.

Again, if the papers he alluded to disclosed that the defendant company was guilty of unfair practices, it amounts to oppression to insist now that it should submit to an unlimited inspection, before the Commission has even formulated a complaint against it, when the Commission was already in a position to draw the complaint, and it would be necessary for the defendant to bring its books and papers a second time before the Commission on the hearing of the charge. *Mobile Gas Co.* v. *Patterson*, 288 Fed. 884, 889.

A search of private papers and effects is a serious matter. The Constitution places it upon the same level as a seizure of the person, and permits either only when necessary and where facts are made to appear upon due oath or affirmation. The Fourth Amendment was intended to be a restraint upon the executive power and to prevent oppression by governmental officers. It was plainly its intent in providing the requirement of a due showing of probable cause that one who falsely or unjustifiably brought about a wrongful search or seizure should pay a penalty therefor. If, however, mere hearsay from undisclosed sources, and sources which the court, in the nature of things, cannot review and weigh and pass upon for itself, be sufficient, the intent of the Constitution could be, for all practical purposes, frustrated, and the courts would become but blind instruments for its nullification. Accordingly, the courts have repeatedly refused to sanction searches and seizures founded only upon this unreliable species of information and belief. *Veeder* v. *United States*, 252 Fed. 414, 418,

certiorari denied, 246 U. S. 675; *United States* v. *Baumert*, 179 Fed. 735, 736-8; *United States* v. *Michalski*, 265 Fed. 839; *United States* v. *Harnich*, 289 Fed. 256, 258, and other authorities cited, *supra*. No doubt it was with these considerations in mind that the court in the *Veeder* case said:

> "If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law."

It is, therefore, submitted that in the case at bar there is neither the specific complaint of wrongdoing, nor the probable cause, nor the kind or quality of proof thereof, which the Constitution makes imperative to warrant a search of a party's papers and effects.

2. The foregoing disposes of all the contentions which the Commission made upon this score in the court below. No others should, therefore, be available for review in this court. *McCarthy* v. *Arndstein*, 262 U. S. 355, 360; *Ward* v. *Love County*, 253 U. S. 17, 25; *Missouri Pacific Ry.* v. *Fitzgerald*, 160 U. S. 556, 575; *Morrill* v. *Jones*, 106 U. S. 466, 467. Notwithstanding this well-established rule, however, it is now urged in the brief filed on behalf of the Federal Trade Commission, and for the first time in the course of the present controversy, that the record does set forth specific charges of wrongdoing and presents clear probable cause for the

search and seizure of the defendant company's documents. We shall, therefore, briefly examine the new contentions of the Commission in that respect.

(a) The first position now taken is that the Commission was investigating *complaints* against the defendant company. When the record is examined, however, it is plain to a demonstration that neither of the alleged complaints is any warrant for the desired search. The first "complaint" is that of September 16, 1921, referred to in paragraphs 9 and 10 of the petition (p. 6). It amounts to nothing but a mere unverified rumor, conclusion of law, surmise and suspicion. It states no facts whatever under any responsible oath and could hardly be more indefinite. The averment is (p. 6):

> "That said complaint alleged that said respondent in the conduct of its business in interstate commerce was indulging in practices which were in violation of certain provisions of the several acts of Congress, or certain of them, among which is the act of Congress approved September 26, 1914 (38 Stat. 717), in that the respondent was using certain methods or business practices resulting in unfair competition, in that it was regulating and fixing, or attempting to regulate and fix, the prices at which the commodities sold by it should be resold by those to whom it had sold them, and was coöperating, aiding, and abetting others to successfully formulate and carry out a scheme or combination, pursuant to which the resale prices of respondent's commodities should be fixed and maintained by those to whom respondent had previously sold its products or commodities."

The court will not fail to note that the allegations of the petition in this relation are carefully framed to avoid

any responsibility therefor on the part of the Commission or its secretary who verifies the pleading. In paragraph 9 (p. 6) it is stated merely that a complaint "was filed with the Federal Trade Commission," and in the extract above quoted all that is pleaded is "that said complaint *alleged*" the matters following. Most significant is the circumstance that nowhere in the whole record is there to be found the direct or positive assertion even that the vague and indefinite charge quoted above is true. No one *swears* to any such *fact*. No one could be punished for any perjury in respect of this pleading, even if it could be demonstrated beyond possibility of doubt that there was not the slightest truth in the alleged complaint, or that it was a wholly unwarranted conclusion.

But the utter insufficiency of the "complaint" does not end here. In addition to refusing to adopt the charge itself, the Commission does not attribute it to any one else. No complainant whatever is named by it. The defendant company, indeed, before the mandamus proceeding was commenced, inquired who was the complainant; but the Commission refused to disclose his identity (pp. 16, 18-19). So that not even his oath or responsibility stands behind the present effort to seize and search the defendant's papers. It is submitted that it is too plain to be debatable that any such procedure makes an empty word of the solemn requirement of the Constitution that applications for searches and seizures shall be "supported by oath or affirmation." In the case at bar there are neither *facts* alleged nor any *oath* made

thereto. Any indefinite, malicious, anonymous communication to the Federal Trade Commission is, under its present contentions, sufficient to warrant it in undertaking a limitless inquisition against a private corporation engaged in interstate commerce.

In such circumstances, what, in truth, has a judge before him on an application to permit the search? The duty to permit the search and to limit it to a reasonable extent rests upon him and not upon the Commission. Manifestly, he has not before him any responsible oath. Nor has he any fact, save that an anonymous complaint has been made to the Commission. But what are the *facts* complained about? That does not appear. It is vaguely stated that (1) laws have been violated, (2) unfair methods of competition employed, (3) resale prices regulated or attempted to be. But when? How? Where? With whom? All these matters which, in the very nature of things, must be evidenced by clear and numerous overt acts, for the most part open and notorious and known to many, are not the subject of a single particularized allegation. Clearly no court is able intelligently to determine the reasonableness of any search or seizure, or how far it should extend either in time or place or in respect of what persons, without specific facts pertinent to those matters. In a word, there is no "showing" whatever of "probable cause." It would obviously be unreasonable, for example, if the unfair practices occurred only in Philadelphia in 1920 and as respects two or three customers, to permit a search and seizure of the defendant's papers having to do with every part of its business in America and abroad,

and during every year of its corporate existence, and affecting every one of its customers. The court will, however, search the record in vain for any *facts* which would have enabled the court below to pass upon the necessity and reasonableness, or the manner, or the extent of the search, which the alleged complaint might properly warrant. The reason for the absence of any such facts is, of course, patent: the claim of the Commission in the court below was that it had a right to make an unlimited search wholly regardless of the existence of any specific complaint or probable cause. Naturally, therefore, its pleadings, etc., laid no basis for the entirely different contentions now urged in its behalf in this court.

(b) The other alleged complaint upon which the Commission now relies, is the so-called Philadelphia complaint (pp. 24-30).

Before, however, we discuss the allegations of this complaint, it is necessary to point out that, as matter of fact, that complaint no longer exists. As has been stated above, the Commission has heretofore duly heard that controversy, and, as appears by its order of February 16, 1924 (see appendix), it has taken "the testimony and evidence" and been "fully advised in the premises" and has thereupon directed "that the complaint . . . be . . . dismissed against respondent P. Lorillard Company."

Manifestly, the Commission does not, in any event, any longer need any inquisition into the papers of the defendant company to sustain or investigate that particular alleged complaint. The investigation having been

duly completed by it and the complaint dismissed, the controversy in the case at bar, in so far as it relates to this so-called Philadelphia complaint, has necessarily become entirely moot, and thus presents nothing for this court to pass upon in that relation. *Brownlow* v. *Schwartz*, 261 U. S. 216; *Atherton Mills* v. *Johnston*, 259 U. S. 13; *Heitmuller* v. *Stokes*, 256 U. S. 359; *United States* v. *Alaska S. S. Co.*, 253 U. S. 113.

But the Philadelphia complaint never, in fact, had any substantial bearing on the case at bar. It concerned specified misconduct with relatively few persons and only in the city of Philadelphia and only during some part of the year 1920. The defendant duly offered "to produce for the hearing on this complaint its documentary evidence relating to said complaint whenever due demand is made by the Commission or is authorized by a court of competent jurisdiction" (p. 43). The writ of mandamus prayed for in the case at bar, however, sought papers and documents relating to unspecified charges of violation of law and affected every customer and every jobber and every sales employee of the defendant throughout the entire United States and had to do with the subsequent year 1921. It is little short of preposterous to argue that any such search could be defended as reasonable or necessary in respect of the Philadelphia complaint. There are no allegations establishing any substantial relation between the Philadelphia complaint and the unlimited search sought herein (see par. 42, petition, p. 10), and it is plain upon its face that there can be none in truth.

(c) Finally, it is asserted by the Commission (brief, p. 53) that probable cause for the search herein prayed is to be found in its report to the Senate, if not in its sworn petition and affidavits.

The allegations of the petition in this connection are that on January 17, 1922, the Commission made a report to the Senate pursuant to Senate Resolution No. 129, above referred to; that the report was printed as a public document, and "that said report is preliminary and does not purport to set forth all of the facts relating to the subject matter therein discussed" (pars. 33-36, p. 9). The answer, which must be taken as true on this application by the Commission for a peremptory writ of mandamus, "denies that the petitioner's said preliminary report of January 17, 1922, to the United States Senate truly sets forth or represents the facts concerning this respondent developed by its said investigation of respondent's business and affairs" (par. 14, p. 35).

Disregarding the fact that the defendant's positive denial nullifies the allegation of the petition, it is still clear that the averments of the petition concerning the report do not satisfy the requirements of the Constitution. They do not present to the court facts to show a specific violation of law by the defendant or probable cause, and they are not supported by due oath or affirmation; and, in addition, it affirmatively appears from the petition itself (par. 36, p. 9) that the report is only tentative and partial.

Moreover, it is submitted that in any event, this court, should not sanction the practice of compelling courts of first instance, on applications for writs of mandamus, at

their peril to search through more than a hundred pages of an executive report to the Senate in order to determine whether there is probable cause shown therein for a search. The petition, which is under oath, should distinctly state the requisite facts, and recourse should not be permitted to unverified reports, full of mere gossip, hearsay, surmise and suspicion, as a substitute for responsible and definite allegations. Otherwise the constitutional requirements would be readily nullified.

3. In the brief filed on behalf of the Commission in this court its powers are likened to those of the grand jury, and reliance is placed upon authorities having to do with grand jury proceedings. Thus, *Hale* v. *Henkel*, 201 U. S. 43; *Wilson* v. *United States*, 221 U. S. 361; *Wheeler* v. *United States*, 226 U. S. 478, and *Essgee Co.* v. *United States*, 262 U. S. 152, were all cases in connection with grand jury investigations.

Under our system of jurisprudence, the grand jury is an inquisitorial body with the most comprehensive powers of inquiry. *Blair* v. *United States*, 250 U. S. 273, 280, 282; *Hale* v. *Henkel*, 201 U. S. 43, 65. Such was its nature when the Constitution was framed, and as such it was taken over into our system of law and recognized in the Constitution itself. Specific charges and probable cause have never been regarded as necessary to the exercise of its investigating powers. *Id.*; *Hendricks* v. *United States*, 223 U. S. 178, 184. The protection of the individual against abuse of power by a grand jury lies in the supervision and control of the courts and in the secrecy of the proceedings. *Hale* v. *Henkel*, 201 U. S. 43, 59, 61,

65; *Savin, Petitioner*, 131 U. S. 267, 277; *Charge to Grand Jury*, 2 Sawyer 667, 677; *United States* v. *Providence Tribune Co.*, 241 Fed. 524, 526.

Administrative boards or commissions, however, are not on a parity with grand juries in this respect. The prohibition against unreasonable searches and seizures contained in the Fourth Amendment was especially aimed at governmental exercises of power without probable cause by executive officers. That was, indeed, the primary and inducing cause of the Amendment. It is, consequently, operative in fullest measure against such a body as the Commission; and particularly ought that to be the case where, as here, if the Commission's contentions be sound, no obligation of secrecy or effectual control by courts would restrain its power to investigate and make public the information thus obtained.

IV.

THE COMMISSION HAS NO POWER TO COMPEL THE PRODUCTION OF THE DEFENDANT'S DOCUMENTARY EVIDENCE RELATING TO INTRASTATE COMMERCE.

The principal part of the defendant company's business, that is, the manufacture of its goods, is indisputably not interstate commerce (*Coe* v. *Errol*, 116 U. S. 517, 525, 528; *Kidd* v. *Pearson*, 128 U. S. 1, 20; *Del., Lack. & West. R. R. Co.* v. *Yurkonis*, 238 U. S. 439, 444; *Hammer* v. *Dagenhart*, 247 U. S. 251, 272, 273; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259; *Crescent Oil Co.* v.

Mississippi, 257 U. S. 128, 135-6; *United States* v. *Basic Products Co.,* 260 Fed. 472, 479; *Maynard Coal Co.* v. *Federal Trade Com.,* 48 Wash. Law Rep. 278); and the same is true of the large amount of sales made annually which are consummated entirely within the same state.

In enacting the Federal Trade Commission Act, Congress was exercising its constitutional power solely with respect to the regulation of interstate and foreign commerce. Nothing in the statute better illustrates the intent of Congress to limit and confine the enactment to interstate and foreign commerce, and to that alone, than the definition of the term "commerce" as used throughout the statute. Thus, section 4 provides that "when found in this act"—

> " 'Commerce' means commerce among the several states or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such territory and another, or between any such territory and any state or foreign nation, or between the District of Columbia and any state or territory or foreign nation."

Hence, the use of the term "commerce" now in question was not intended to relate and does not relate to or include intrastate commerce. The unfair practices which the act forbids (sec. 5) are, as the statute expressly declares, only those in the course of actual interstate commerce. *Ward Baking Co.* v. *Federal Trade Commission,* 264 Fed. 330; *Winslow* v. *Federal Trade Commission,* 277 Fed. 206, 209, certiorari denied, 258 U. S. 618. That is, indeed, necessarily so, because the several states hold differing views upon this subject, and their laws apply

to and govern transactions in intrastate commerce within their respective borders. For example, in some states resale price fixation may be regarded as lawful and valid; and it is indisputable that the Federal Government may not interfere with agreements made in such states towards that end, so long as they are restricted to intrastate commerce alone.

It follows, therefore, that nothing in section 5 of the statute warrants an inquisition into the defendant company's records concerning its dealings and doings in intrastate commerce. That part of its books and papers should be immune from the Commission's reach; and the record shows affirmatively that more than half of the defendant's correspondence with its customers "relates to transactions in intrastate commerce" and is "with individuals and partnerships not subject to the terms and provisions of the Federal Trade Commission Act" (p. 41).

Again, it is settled that whatever may be the visitatorial power of the Federal Government over private state corporations, it does not extend beyond their activities in interstate commerce. *Hale* v. *Henkel,* 201 U. S. 43, 75; *Interstate Commerce Com.* v. *Goodrich Transit Co.,* 224 U. S. 194, 215; *United States* v. *Basic Products Co.,* 260 Fed. 472, 481; *Maynard Coal Co.* v. *Federal Trade Com.,* 48 Wash. Law Rep. 278; *Federal Trade Com. v. Claire Furnace Co.,* 285 Fed. 936. In *Hale* v. *Henkel, supra,* Mr. Justice Brown, speaking for the court, said:

> "It is true that the corporation in this case was chartered under the laws of New Jersey, and

that it receives its franchises from the legislature of that State; but such franchises, *so far as they involve questions of interstate commerce*, must also be exercised in subordination to the power of Congress to regulate such commerce, and *in respect to this* the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government *in this particular* in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. *It is not intended to intimate, however, that it has a general visitatorial power over state corporations.*"

Manifestly, there can be no presumption that Congress intended to invade the field reserved under the Constitution to the several states, by interfering with transactions in intrastate commerce. If that had been its purpose, it would certainly have made it clear by the use of plain and unambiguous language. The declared purposes of the act of Congress have only to do with interstate commerce, and a power of investigation commensurate with that subject matter is all that is reasonably necessary for the effectuation of the legislative intent. It is submitted, therefore, that subdivision (a) of section 6, which grants the Commission power to investigate corporations engaged in interstate commerce, does not authorize an investigation of their intrastate business. If it did, it would be at least of very doubt-

ful constitutionality; and it is well settled that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *Bratton* v. *Chandler*, 260 U. S. 110, 114; *Arkansas Gas Co.* v. *Railroad Com.*, 261 U. S. 379, 383; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407-8.

The contention of the Commission to the contrary is founded upon a doctrine which has been squarely overruled by this court. Thus, in the *Employers' Liability Cases*, 207 U. S. 463, 502, the late Chief Justice declared as follows:

> "It remains only to consider the contention, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limita-

> tions of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures."

The claim of the Commission has, in fact, been several times expressly denied by the lower courts. *United States* v. *Basic Products Co.*, 260 Fed. 472; *Maynard Coal Co.* v. *Federal Trade Com.*, 48 Wash. Law Rep. 278, and *Federal Trade Com.* v. *Claire Furnace Co.*, 285 Fed. 936. Thus, in the *Basic Products Company* case, the Commission sought a mandamus to compel the company to afford access to its records and papers in order that the Commission might discover what it cost the company to manufacture an article which the company had previously sold to the Navy. It is settled that manufacture is not interstate commerce (*Hammer* v. *Dagenhart*, 247 U. S. 251, 272, and the authorities cited *supra*, pp. 70-1), and the court, accordingly, refused to permit this violation of the corporation's right of privacy, District Judge Orr saying (260 Fed. at p. 481):

> "Imagination . . . cannot suggest such an extension of constitutional limitation as may justify the investigation undertaken by the Commission in this case. Indeed, so far as the matter has been brought to the attention of the court, no such assertion of power has ever been made to the courts. Investigation under subdivision a, section 6, is limited to corporations engaged in interstate commerce. The defendant is engaged in manufacture."

In the case at bar, there is not a *scintilla* of allegation or proof that the defendant company's manufacture of tobacco products, or its sales thereof in local commerce,

are in any wise directly or exceptionally related to interstate commerce. There is absolutely nothing in the record to show that such intrastate manufacture and sale are in any respect different from the commonplace dealings in intrastate commerce with which Congress did not intend to interfere. The efforts of the Commission to find an analogy between the case at bar and such an unusual situation as came before the court in *Stafford* v. *Wallace*, 258 U. S. 495, are, therefore, futile. Unless the court is at liberty to indulge in the far-reaching presumption that *all* private intrastate business throughout the United States of persons or corporations also engaged in interstate commerce burdens or obstructs interstate commerce, or is so inseparably interwoven therewith as to require federal control and supervision, there is no basis for such an inference in this case, and hence no foundation or necessity for the exercise of the inquisitorial power of the Commission thereover.

As stated by the court in the *Claire Furnace Company* case, 285 Fed. at p. 944, in respect of the authorities there cited by the Commission, so it may be said of the decisions which the Commission relies upon in the case at bar, viz.:

> "The cases relied upon by the Commission [in support of its alleged power comprehensively to investigate all transactions of a corporation, whether in interstate commerce or not], relate chiefly to the power of Congress, either directly or through the Commission, to regulate and inquire into the affairs of corporations engaged in the operation of instrumentalities of interstate commerce, or industries so closely allied as to form a part of the general business entering into such commerce, and capable of being so conducted as to impose a burden on interstate commerce."

Such cases are clearly not at all like that at bar.

More nearly similar to the present case is *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 255. There it appeared that sixty per cent of the business of the taxicab company was that of a common carrier. As to that portion of the business, the court held that the Public Utilities Commission of the District of Columbia had jurisdiction and was entitled to require information. The remainder of the company's business, however, was not that of a public utility; it consisted of letting automobiles to persons who applied at the company's garage. The court, therefore, denied the Commission's right to information as to the latter portion of the taxicab company's business, notwithstanding the fact that it constituted forty per cent of the entire business of a public utility company, and was in at least as close and intimate relation to the rest of the business as the defendant company's intrastate business bears to its interstate business in the case at bar.

Mr. Justice Holmes, delivering the unanimous opinion of the court, distinguished and put aside the *Goodrich Transit Co.* case (224 U. S. 194), upon which the Federal Trade Commission places reliance, with the following statement (241 U. S. p. 256):

> "There is no such connection between the charges for this last [branch of the taxicab company's service] and the others as there was between the facts required and the business controlled in *Int. Com. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194, 211."

It should, moreover, be borne in mind, in considering the *Goodrich Transit Company* case in connection

with the case at bar, that the right of a rate-fixing body like the Interstate Commerce Commission to have information as to the property used, expenditures made and income received from a related intrastate business, plainly stands upon a different footing from the right of a body, which has and can have no rate-making functions, to similar information. The Federal Trade Commission, certainly so far as the defendant tobacco company is concerned, has no power to control or regulate its prices (*United States* v. *Freight Association*, 166 U. S. 290, 320; *Mennen Co.* v. *Federal Trade Commission*, 288 Fed. 774, 781, certiorari denied 262 U. S. 759), and would not in any event be entitled to the information which this court in the *Goodrich Transit Company* case permitted the Interstate Commerce Commission to elicit.

For the foregoing reasons it is submitted that the court below was right in refusing to require the defendant company to give access to papers pertaining to its manufacturing or other intrastate business.

V.

MANDAMUS IS NOT THE PROPER REMEDY FOR COMPELLING THE PRODUCTION OF THE DOCUMENTARY EVIDENCE SOUGHT BY THE COMMISSION.

It has long been the settled rule that the writ of mandamus is only to be resorted to as a remedy where there is no other appropriate procedural method of relief and that it should issue only on extraordinary occasions. Stated in other words, as frequently declared by this

court, mandamus only lies as a general rule where there is no other adequate remedy. *Kendall* v. *Stokes,* 3 How. 87, 101; *Kendall* v. *United States,* 12 Pet. 524, 614; *In re Pennsylvania Co.,* 137 U. S. 451, 453; *Ex parte Riddle,* 255 U. S. 450, 451; *American Eng. Co.* v. *Metropolitan By-Products Co.,* 280 Fed. 677, 682, certiorari denied, 254 U. S. 640 and 257 U. S. 653. So far as a search of precedents has disclosed, mandamus has never been granted as a substitute for a subpoena duces tecum, where the latter would afford plain, adequate and complete relief.*

The case at bar is entirely different from those legal actions in which somewhat broad subpoenas duces tecum have been sustained. In suits at law, the nature of the controversy, the admissions in the pleadings and the rules of evidence and proof, all operate to limit and restrict the issues and thus to fix and limit the scope and extent of a subpoena in the case. Any subpoena duces tecum as sweeping in its terms as the writ of mandamus now prayed for would be regarded as unreasonable and unwarranted (*Hoppe* v. *W. R. Ostrander & Co.,* 183 Fed. 786; *Mobile Gas Co.* v. *Patterson,* 288 Fed. 884; *United States* v. *Terminal R. Assn.,* 154 Fed. 268, 272; *Ex parte Brown,* 72 Mo. 83, 93; *Carson* v. *Hawley,* 82 Minn. 204), and the court would certainly require it to be made "suitably specific and properly limited in its scope." *Hale* v.

* *Ex parte Uppercu,* 239 U. S. 435, is not to the contrary. In that case the court below had refused the petitioner access to papers in *custodia legis.* Manifestly it was necessary for the petitioner to secure a mandamus from this court before the court below could reasonably be expected to issue or honor any subpoena in view of its prior holding.

Henkel, 201 U. S. 43, 76-77; *Wilson* v. *United States*, 221 U. S. 361, 376; *Essgee Co.* v. *United States*, 262 U. S. 151, 157.

But if the present claims of the Commission be upheld, it is clear that there would be no limiting elements of protection whatever, except the will of the Commission. The Commission asserts that there need be no alleged violation of law and no specific complaint or pleading or charge, that there need be no probable cause or relevancy, and that there need be no fixed and definite subject-matter of investigation. In brief, an "unlimited right" is asserted, indefinite, unbounded by time, place, or circumstances. The court will readily perceive that if the writ of mandamus be issued as prayed for, obedience to its sweeping and all-inclusive mandate would be imperative and that the defendant corporation could not then protect itself against having to produce irrelevant and incompetent documentary evidence or evidence which would, under settled rules, be privileged. A court, having once issued a mandamus directing "any person or corporation" to produce all documentary evidence in his or its possession, there would be no procedure which would protect such person or corporation in any particular. Every document in his or its possession, relevant or irrelevant, privileged or unprivileged, confidential or otherwise, would have to be thrown open to the agents of the Commission with right to copy. Under the procedure governing the issuance of subpoenas duces tecum, however, the legal and constitutional rights of the individual or corporation could readily be protected.

In enacting the Federal Trade Commission Act, Congress must be presumed to have had these well-known general rules in mind; and it, therefore, follows that it is proper and reasonable to assume that it did not intend to vest in the Commission power in its discretion to substitute the writ of mandamus for the subpoena duces tecum as a remedy to compel the production of documentary evidence, especially as such substitution might deprive the custodian of the documentary evidence of due protection in his or its legal and constitutional rights.

An analysis of section 9 will show that it was in all probability the intention of Congress that the attendance of witnesses and the production of documentary evidence should be required by means of subpoenas and not by writ of mandamus. The Commission was authorized to issue subpoenas for that purpose, and the District Courts of the United States were given jurisdiction, in cases of refusal to obey such subpoenas, to issue orders "requiring such corporation or other person to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question." The first paragraph of section 9 grants to the Commission power to issue subpoenas for the attendance and testimony of witnesses. The second paragraph provides that in case of disobedience to a subpoena so issued, the Commission may invoke the aid of any court of the United States; the third paragraph confers jurisdiction on the District Courts to compel obedience to

such subpoenas, and the fifth paragraph (directly following the paragraph providing for the writ of mandamus) again declares that "any person may be compelled to appear and depose and produce documentary evidence *in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided,*" that is, as provided in the first, second and third paragraphs, which require a subpoena and thus entitle the person served to have the judgment of an impartial court of justice as to the relevancy, competency, or privileged character of the documents in question and the reasonableness of the attempted examination or search.

Undoubtedly Congress intended in this manner to afford protection to those who might be subpoenaed by the Commission and a guaranty that their constitutional right under the Fourth Amendment to be secure in their persons and papers against unreasonable searches and seizures should not be violated and that no order to produce documentary evidence would issue but upon probable cause supported by oath or affirmation satisfactory to a court of justice.

Thus, the particular subject of documentary evidence and the manner in which its production should be required, was specifically provided for in express terms, and in every aspect the protection of an impartial tribunal or court of justice was assured, so that no one could be compelled to testify "*touching the matter in question*", or to produce documentary evidence, unless so ordered by a District Court. The procedure of

a peremptory writ of mandamus would afford no such protection as this court has repeatedly recognized attends the enforcement of the remedy of a subpoena duces tecum. For example, in *Hale* v. *Henkel, supra,* the court said (201 U. S. 43, at p. 65):

> "Doubtless abuses of this power [i. e., subpoenas duces tecum in aid of a grand jury investigation] may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the court, it would doubtless be alert to repress them." (See also remarks of Mr. Justice McKenna at foot of p. 80.)

Hence, the generality of the words used in the provision of the Act for writs of mandamus to command compliance with the Act or any order of the Commission in pursuance thereof, should be limited so as to exclude what is specifically covered by the particular provisions relating to subpoenas. *United States* v. *Walter*, 263 U. S. 15, 18.

The fourth paragraph of section 9 conferring jurisdiction upon District Courts to issue writs of mandamus can readily be given due operation and scope if restricted to the orders which the Commission may duly issue, other than "notices or demands" for the appearance of witnesses and the production of documentary evidence, and to the enforcement of the judicial decrees provided for in section 5. The fundamental theory of the Federal Trade Commission Act obviously is to create an administrative body with power in proper cases to issue orders to persons, partnerships, or corporations

to cease and desist from unfair methods of competition, which orders were to be reviewable and enforceable as provided in section 5; but additional power was conferred in and by section 6 to issue "general or special orders" requiring corporations engaged in interstate commerce to file reports, and it was made the duty of all persons subject to the jurisdiction of the Commission to obey and comply with such orders. Mandamus would clearly be and afford an appropriate, and in fact the only adequate, remedy to enforce compliance with any orders issued under section 6 (b). This conclusion and limitation of the jurisdiction to issue writs of mandamus would coördinate the various provisions of the statute, and the result would then be (1) that orders to cease and desist from using unfair methods of competition under section 5 would be enforceable as in such section expressly provided or by mandamus after a decree of a Circuit Court of Appeals, (2) that general or special orders for reports under section 6 (b) would be enforceable by mandamus as authorized by the fourth paragraph of section 9, and (3) that the attendance and testimony of witnesses and the production of documentary evidence would be enforceable by subpoena as provided in the first, second, third and fifth paragraphs of said section. It is entirely reasonable to assume that such was the intention of Congress and that Congress did not intend to permit the Commission in its discretion to substitute mandamus for subpoena whenever the Commission conceived that mandamus would afford it a wider and freer inquisition and deprive the person or

corporation under the investigation of the protection which the rules as to the subpoenas would clearly afford.

If the procedure adopted by the Commission in the case at bar be sustained, the protection of the Fourth Amendment against unreasonable searches and the requirement of a showing of probable cause might be practically nullified. Under the long established practice of the courts, a person or private corporation subpoenaed to produce documentary evidence in his or its private possession for inspection by third parties—whether subpoenaed by individuals or administrative departments or legislative investigating bodies—is entitled to be protected against the inspection of papers which are not shown to be relevant to the subject matter of any particular proceeding. There must be a preliminary showing of probable relevancy, or to use the phrasing of the present statute, the production is limited to "documentary evidence relating to any matter under investigation," or to "evidence touching the matter in question" (sec. 9). If, for example, a subpoena duces tecum had been served in this matter calling indiscriminately for all the papers above described (pp. 2-3), it is reasonably certain that any District Court would have held it to be "far too sweeping in its terms to be regarded as reasonable" within the meaning and effect of the Fourth Amendment. *Hale* v. *Henkel*, 201 U. S. 666, and *Wilson* v. *United States*, 221 U. S. 361, 376. The mere resort to a different remedy—to mandamus instead of subpoena—cannot make any material difference. Constitutional guaranties deal with substantial rights and liberties, and cannot be rendered futile by resort to mere changes of form or procedure.

In the court below the learned counsel for the Federal Trade Commission contended, as the chairman of the Commission had previously insisted (p. 17), that the statute had provided two ways "in which the Commission can obtain access to the records and correspondence of a corporation engaged in interstate commerce," and argued as follows (Commission's reply brief below, pp. 3, 50):

> "One way is by a subpoena duces tecum. The other is by writ of mandamus.
>
> "We take it that Congress provided these two ways, for the reason that the Commission not having information as to the manner in which a corporation kept its books, records and correspondence, that it would not always be possible for the Commission to issue a subpoena for a witness to produce the book, document, or letter that would disclose the information sought. . . .
>
> "If this information [*i. e.*, that sought in the case at bar] cannot be obtained by mandamus, it cannot be obtained by a subpoena duces tecum, for the reason that the petitioner cannot make a more definite description of the correspondence and papers which it desires access to examine than has been set forth in the Notice and Demand that has been served."

In other words, the contention was that Congress intended to provide that if the omnibus, unlimited and unrestricted—and, constitutionally speaking, unreasonable—production of documentary evidence could not be required under a subpoena duces tecum, it should be obtainable under a writ of mandamus. It should be sufficient refutation of this argument to say that if Congress had really intended any such alternative remedy of doubtful constitutionality, it would, of course,

have readily found appropriate language to express such an intention. On the contrary, nothing in paragraph fourth of section 9 supports the suggestion that it was to be an alternative for the carefully worded, specific and adequate provisions in the other paragraphs providing for the attendance and testimony of witnesses and the production of documentary evidence under subpoenas subject to enforcement by the District Court.

It is, therefore, submitted that the writ of mandamus cannot be employed under the Federal Trade Commission Act to perform the function of a subpoena duces tecum for the production of documentary evidence and in such a manner as to deprive any one of the substantial constitutional protection against unreasonable searches without the showing of probable cause and without support by proper oath or affirmation, which the Fourth Amendment was intended to guarantee and which it plainly requires.

VI.

THE COURT BELOW WAS JUSTIFIED IN THE EXERCISE OF ITS SOUND DISCRETION IN DENYING THE REMEDY OF MANDAMUS AND LEAVING THE COMMISSION TO SECURE ANY PROPER AND RELEVANT DOCUMENTARY EVIDENCE BY MEANS OF THE ORDINARY PROCEDURE OF A SUBPOENA DUCES TECUM IN A PROPER PROCEEDING.

The writ of mandamus is not a writ of right, but a highly discretionary remedy (*Turner* v. *Fisher*, 222 U. S.

204, 209; *Arant* v. *Lane*, 249 U. S. 367, 371); and it is issued only when the court has been convinced that justice demands it and the case is free from doubt. *Id.*; *United States* v. *Louisville & N. R. Co.*, 212 Fed. 486, 494-5, affirmed, 236 U. S. 318; *United States* v. *Nashville C. & St. L. Ry. Co.*, 217 Fed. 254, 264-5. In *United States* v. *Louisville & N. R. Co.*, a case in many respects similar to the case at bar, the District Court pointed out that "granting a writ of mandamus is always a matter of sound discretion"; that the Interstate Commerce Commission was demanding a large number of papers; that it was urging a doubtful construction of the statute there in question; that it had commingled together in its demands matters which it was not entitled to inspect with those to which it might have a right of access; that "to grant the writ in the broad and general, not to say unlimited, terms asked for . . . might be perilously near the unreasonable search forbidden by the Constitution", and that "such confusion [existed] between what might be good and what bad that the court [did] not think it discreet to grant the writ."

As has been shown above, all that and more can be properly urged against the Federal Trade Commission's application for the writ in the case at bar. Doubt certainly beclouds its entire case. Arbitrariness, oppression, *ultra vires* and unconstitutionality, as we have seen, lurk in its all-inclusive claims and contentions and may be reasonably, even if not conclusively (as we believe), urged against them. Whatever there may be of right in its demands is hopelessly intermingled with extravagant,

arbitrary and illegal claims. The court below would in any event have been warranted in refusing to reframe the Commission's case and segregate the good from the bad, the legal from the illegal. That would be a delicate and onerous task at best; and the Commission could not be permitted thus to transfer its responsibilities to the court below, nor be permitted now to mend its hold to the prejudice of the defendant company.

It is submitted, therefore, that the court below, in the exercise of a sound discretion, rightly concluded that "it would be unreasonable and unjust to accede to the demands of the petitioner" (283 Fed. at p. 1007), and hence properly denied the Commission's application for a writ of mandamus in the case at bar. This court should not, consequently, now disturb the exercise of this discretionary power. *Hyde* v. *Shine*, 199 U. S. 62, 85.

Conclusion.

For the foregoing reasons, it is submitted that the application of the Federal Trade Commission for a peremptory writ of mandamus against the defendant-in-error, P. Lorillard Company, was rightly denied and that the order of the court below should be affirmed.

Washington, D. C., March, 1924.

William D. Guthrie,
William B. Bell,
William R. Perkins,
Bernard Hershkopf,
Of counsel for defendant-in-error.

ORDER DISMISSING PHILADELPHIA COMPLAINT.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission held at its office in the City of Washington, D. C., on the 16th day of February, A.D. 1924.

Present:

HUSTON THOMPSON, Chairman,
VERNON W. VAN FLEET,
NELSON B. GASKILL,
VICTOR MURDOCK,
JOHN F. NUGENT.
Commissioners.

IN THE MATTER OF Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, its Officers, Directors and Members, The American Tobacco Company, *et al.*	Docket No. 886. Order of Dismissal as to P. Lorillard Company.

This proceeding having come on for hearing before the Federal Trade Commission upon the complaint of the Commission, the answers of the respondents and the

testimony and evidence, and the Commission being fully advised in the premises,

IT IS ORDERED that the complaint herein be and the same is hereby dismissed as against respondent P. Lorillard Company.

(Signed) OTIS B. JOHNSON,
OTIS B. JOHNSON,
Secretary.

ELS-WTJ
1-26-24
(SEAL)